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CASES ADJUDGED IN THE
UNITED STATES CUSTOMS COURT

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UNITED STATES CUSTOMS COURT

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CASES REPORTED IN FEDERAL SUPPLEMENT

RESOLUTIONS PASSED BY THE UNITED STATES CUSTOMS COURT UPON THE DEATH OF DAVID JOHN WILSON JUDGE UNITED STATES CUSTOMS COURT

The Court records with deep regret the untimely death of David John Wilson, Senior Judge, our esteemed friend and distinguished jurist, on April 23, 1976, in Salt Lake City, Utah.

The life and works of David John Wilson were an outstanding model of the highest traditions of our judicial system. His extensive knowledge, experience and ability as a Judge in the complex practice and procedure involving the customs law serve as an enduring example.

David John Wilson, the son of James B. and Margaret Powell Wilson, was born at Midway, Utah on October 27, 1887. He was educated at Midway Public Schools and received his Bachelor of Science degree from Brigham Young University. At the University of California he served two years as editor of the California Law Review and in 1919 received a Juris Doctor degree.

From the time of his admission to the Utah Bar in 1919 until 1954, he practiced law in the City of Ogden, Utah enjoying a vigorous and varied legal career which included positions as Weber County Attorney, District Attorney for the Second District of Utah, and General Counsel of the Federal Building & Loan Association of Ogden, Utah.

Concurrently, during the course of his practice, he also devoted himself to public service as Chairman of the Advisory Board of the Salvation Army, Ogden Community Chest, President of the Lake Bonneville Council of the Boy Scouts of America.

Our late brother's extraordinary leadership qualities were well suited to the numerous civic leadership positions he held such as Republican Chairman, Weber County; Chairman First Congressional District, State of Utah; Utah State Republican Chairman, delegate to Republican National Conventions, Republican Party candidate for Congress from Utah's First Congressional District, member and leader of Church of Jesus Christ of Latter-day Saints.

David John Wilson was honored with the Silver Beaver Award; an Honorary Doctor of Law degree from Brigham Young University;

a Distinguished Service Award from Weber State College, a Special Service Award from Brigham Young University, and with admission into many professional societies including the Weber County Bar and Utah Bar Associations.

From the time he was appointed as Judge of the United States Customs Court under a commission issued July 26, 1954 by President Dwight D. Eisenhower, until the time of his death, his associates came to admire and respect his strong keen analytical mind, his legal knowledge, his honesty, integrity and fidelity.

During his judicial tenure, he unstintingly devoted himself to the administrative, as well as the judicial, work of the Court. Notable examples of his industry in this regard was his service as Chairman of the Court Legislation and Jurisdiction Committee, Personnel Committee and Practice and Procedure Committee.

Therefore, be it resolved, That the Chief Judge and the Judges of the United States Custom Court do hereby record their high appreciation of the life and character of David John Wilson, of the respect, admiration and esteem in which he was held and of the loss the Court, the Bar, and customs jurisprudence have suffered by his death and do hereby express their deep sympathy to his devoted and loyal wife Mary, his children and all his family, upon his passing.

/s/ Nils A. Boe

NILS A. BOE, *Chief Judge*

/s/ Paul P. Rao

PAUL P. RAO, *Judge*

/s/ Morgan Ford

MORGAN FORD, *Judge*

/s/ Scovel Richardson

SCOVEL RICHARDSON, *Judge*

/s/ Frederick Landis

FREDERICK LANDIS, *Judge*

/s/ James L. Watson

JAMES L. WATSON, *Judge*

/s/ Herbert N. Maletz

HERBERT N. MALETZ, *Judge*

/s/ Bernard Newman

BERNARD NEWMAN, *Judge*

/s/ Edward D. Re

EDWARD D. RE, *Judge*

APRIL 26, 1976

UNITED STATES CUSTOMS COURT

Customs

(C.D. 4626)

CANADIAN VINYL INDUSTRIES, INC. *v.* UNITED STATES

Imitation patent leather

CLASSIFICATION—POLYURETHANE SHEET WITH NYLON BACKING

An importation consisting of a polyurethane skin with a nylon fabric backing is held to be a flexible sheet almost wholly of plastic, made in imitation of patent leather, classifiable under item 771.40 of the TSUS. The value of the polyurethane material being in excess of the nylon fabric, the importation was not made of textile materials as the term "of" is defined in general headnote 9(f)(i). Consequently the classification as other fabrics of textile materials of man-made fibers, coated or laminated with plastic, under item 355.82 was incorrect.

"ALMOST WHOLLY OF"—GENERAL HEADNOTE 9(f)(iii)

Since the importation's essential character is the distinct visual and tactile quality which is imparted to it by the polyurethane material, the importation is "almost wholly of" plastic as that quoted phrase is defined in general headnote 9(f)(iii). The nylon backing does not impart the essential character to the article.

Court No. 73-5-01298

Port of Champlain-Rouses Point

[Judgment for plaintiff.]

(Decided January 8, 1976)

Barnes, Richardson & Colburn (*James S. O'Kelly* and *Michael Stramiello, Jr.*, of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Steven P. Florsheim* and *Carol A. Calhoun*, trial attorneys), for the defendant.

WATSON, Judge: This case involves an importation composed of a glossy polyurethane "skin" on one side and a nylon fabric on the reverse. The merchandise was classified as other fabrics of textile

materials of man-made fibers, coated or laminated with plastic.[1] Plaintiff's principal claim [2] is for classification as flexible sheets almost wholly of plastic, made in imitation of patent leather.[3]

Plaintiff disproved the correctness of the classification by showing that the importation was not wholly or in chief value of the nylon textile material which, under general headnote 9(f)(i),[4] would be a necessary prelude to classifying this importation as "of" textile material. In fact, plaintiff proved that at the time the components of this material were ready to be joined together (which is the appropriate time to determine their relative value) the cost of the nylon portion was approximately 51 cents per yard and the cost of the polyurethane portion was approximately $1.13 per yard.

This leads to consideration of whether the importation is a patent leather imitation almost wholly of plastic. The phrase "almost wholly of" is defined in general headnote 9(f)(iii) as meaning that the essential character of the article is imparted by the named material. From an examination of the exhibit representative of the importation as well as the testimony of plaintiff's witnesses, I conclude that the essential character of this material is the distinctive visual and tactile quality of the polyurethane "skin." These are the qualities which give this article its own special nature. Whatever the utility or importance of the nylon backing, the nylon portion does not supply the essential character.

Discernment of the essential character of articles is not likely to develop into an exact science but, insofar as some consistency and predictability is possible, it is likely to be found in concentrating on whether the material in question supplies the distinctive feature of the article and not in examining all the characteristics of the article and, if some other material contributes important characteristics, declining to give one material the primacy which its role deserves. General headnote 9(f)(iii) [5] acknowledges the possibility that significant quantities of some other materials may be present and implicitly recognizes that those other materials will impart something to the character of the article.

---

[1] Item 355.82 of the TSUS, as modified by T.D. 68-9, with duty assessed at the rate of 12.5 cents per pound and 15 per centum ad valorem.

[2] Plaintiff's additional claims for classification under items 771.42, 774.60 and 355.85, as modified, are not reached in light of the success of plaintiff's principal claim.

[3] Item 771.40 of the TSUS, as modified, with duty to be assessed at the rate of 4 per centum ad valorem.

[4] The full relevant portion of general headnote 9 reads as follows:

9. Definitions. For the purposes of the schedules, unless the context otherwise requires—

* * * * * * *

(f) the terms "of", "wholly of", "almost wholly of", "in part of" and "containing", when used between the description of an article and a material (e.g., "furniture of wood", "woven fabrics, wholly of cotton", etc.), have the following meanings:

(i) "of" means that the article is wholly or in chief value of the named material;

(ii) "wholly of" means that the article is, except for negligible or insignificant quantities of some other material or materials, composed completely of the named material;

(iii) "almost wholly of" means that the essential character of the article is imparted by the named material, notwithstanding the fact that significant quantities of some other material or materials may be present; * * *

[5] Ibid.

Therefore, the existence of other materials which impart something to the article ought not to preclude an attempt to isolate the most outstanding and distinctive characteristic of the article and to detect the component material responsible for that "essential characteristic." The correct approach is exemplified in *United China & Glass Co.* v. *United States*, 61 Cust. Ct. 386, C.D. 3637, 293 F. Supp. 734 (1968). In that case an article composed of artificial flowers inside a glass ball was found to be almost wholly of glass.[6] In terms of the analysis I am making here, the essential character of the article was manifest in the enclosing effect of the glass ball despite the obvious importance of the artificial flowers within. Similarly, in *Larry B. Watson Co., a/c Decoration Products Co.* v. *United States*, 64 Cust. Ct. 343, C.D. 4001 (1970) the physical adaptability to use of a polyvinyl chloride film was held to be the essential character of the importation although an important visual characteristic was imparted by a metallic or lacquered surface treatment.

In *Marshall Co., Inc., Hoyt, Shepston & Sciaroni* v. *United States*, 67 Cust. Ct. 316, C.D. 4291, 334 F. Supp. 643 (1971) which involved a rayon fabric coated with rubber, I read the opinion as concluding that the article's essential character consisted of attributes of dimensional stability and a burst strength of predetermined value—both imparted by the fabric component. Classification under item 771.42 as other sheets almost wholly of rubber was therefore ruled out.

I note in passing, although it is not crucial to my analysis, that the polyurethane skin of this importation, in addition to supplying the essential visual and tactile characteristics, also contributes attributes of strength and flexibility in conjunction with the nylon backing. It is the polyurethane which is the main subject of the flexing and cracking tests to which the importation is subjected to determine its suitability for use in shoe manufacture. In this respect it is more like the fabric than the rubber coating in the *Marshall* case and is comparable to the polyvinyl chloride film in the *Watson* case. In its contribution to the distinctive character of the importation, it is most like the glass ball in the *United China* case. In short, not only does the polyurethane skin supply the essential character of the importation, which would suffice to make the importation almost wholly of plastic, it is the dominant material in all respects.

As a final matter, I am convinced the importation is made in imitation of patent leather within the meaning of the TSUS. I reach this conclusion both from the testimony of the witnesses who were well qualified to speak authoritatively on the subject and from examination of the smooth and glossy state of the importation's surface. Defendant argues for a degree of hardness and absolute smoothness which I do not find to be a requirement for patent leather.

[6] The consequence of this finding was that headnote 1(i) of schedule 7, part 7, subpart B acted to exclude the article from the "artificial flower" provisions of items 748.20 and 748.21.

For the above reasons I conclude that the importation is properly classifiable as flexible sheet almost wholly of plastic, made in imitation of patent leather, under item 771.40 of the TSUS and is dutiable at the rate of 4 per centum ad valorem.

Judgment will enter accordingly.

(C.D. 4627)

VANCOR STEAMSHIP CORP. *v.* UNITED STATES

VESSEL—FLOATING STRUCTURE

The forebody of a French vessel which was towed across the Atlantic not as a means of transportation on water, but for the single purpose of being used as the forebody for the jumboization (i.e., enlargement of the cargo carrying capacity) of an American tanker held properly classified by the government as a floating structure and not as a vessel. *United States* v. *Bethlehem Steel Co. et al.*, 53 CCPA 142, C.A.D. 891 (1966) followed.

Court No. 69/6257

Port of Mobile

[Judgment for defendant.]

(Decided January 9, 1976)

Hill, Betts & Nash (*Robert W. Mullen* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis*, trial attorney), for the defendant.

MALETZ, Judge: This action involves the dutiable status of the forebody of a French tank vessel known as the Isanda. The forebody was towed across the Atlantic Ocean from Le Havre, France to Mobile, Alabama where it was entered in April 1968. Thereafter, it was classified by Customs as a floating structure under item 696.60 of the tariff schedules, as modified by T.D. 68–9 and assessed duty at the rate of 17 percent ad valorem. Plaintiff claims that the forebody was a vessel within the meaning of section 401(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1401(a)) and hence entitled to duty-free entry by virtue of general headnote 5(e) of the tariff schedules.

The pertinent statutory provisions provide as follows:

Classified under [Schedule 6, part 6, subpart D]:

Subpart D headnote:

1. This subpart does not cover—

* * * * * * *

(ii) vessels which are not yachts or pleasure boats (see general headnote 5(e)).

* * * * * * *

696.60	Buoys, beacons, landing stages, coffer-dams, rafts, and other floating structures (except vessels)----------	17% ad val.

Claimed under [General Headnotes and Rules of Interpretation]:

5. Intangibles. For the purposes of headnote 1—

* * * * * * *

(e) vessels which are not "yachts or pleasure boats" within the purview of subpart D, part 6, of schedule 6,

are not articles subject to the provisions of these schedules.

Section 401(a) of the Tariff Act of 1930, as amended (19 U.S.C. 1401(a)):

(a) The word "vessel" includes every description of water craft or other contrivance used, or capable of being used, as a means of transportation in water, but does not include aircraft.

The facts are as follows: The French vessel Isanda was a 635 foot self-propelled oil tanker with a capacity of about 32,000 tons deadweight that was built in 1955 and was used during the next decade for the carriage of oil and other petroleum products. In 1967, the owners of the Isanda decided to "jumboize" the Isanda, i.e., increase the freight carrying part of the vessel, which was done by removing the entire stern section, including the engines, and joining to that section the larger forebody of another tanker thereby enlarging the Isanda's capacity from 32,000 tons deadweight to 60,000 tons.[1]

After removal of the stern section of the Isanda, there was left a forebody about 497 feet in length and 84 feet in breadth which was purchased by plaintiff, Vancor, in August 1967 for the sum of $400,000. A few days later, plaintiff purchased for $600,000 a T–2 American flag tanker, the Westfield, which was 525 feet in length and had a capacity of 16,500 tons deadweight. Plaintiff's intent in purchasing the Westfield and the former forebody of the Isanda was to jumboize the Westfield by joining the forebody to the stern section of the

[1] In a self-propelled vessel the power plant package at the stern is not only the most significant portion of the total cost of the craft, it constitutes the heart of the vessel. Thus, when one wishes to jumboize a vessel, the identity of the jumboized vessel is represented by that portion of the original vessel containing the power package. The reasons for jumboization of tankers, particularly in the post World War II period, were explained by a witness as follows (R. 258): "The T–2 tanker, a wartime construction, had a relatively high powered character in comparison to the total size of the vessel. In the postwar period, these T–2 tankers which were, at the time of their original conception considered to be large, fast tankers, really turned out to be small fast tankers and, consequently, not nearly so economically competitive as the larger vessels that were being built in that postwar period. It was conceded, therefore, that if one were to take the existing power package of that vessel * * * [attach] this then to a new fabrication to make a larger carrying capacity, one would lose very little in the way of vessel speed, one would increase handsomely in productivity of the vessel at relatively small cost. And, consequently, this led to the jumbolizing practice that saw so many of these T–2's enlarged by a factor of two and sometimes more." See also *Todd Shipyards Corporation* v. *United States*, 63 Cust. Ct. 165, 168, n. 4, C.D. 3891 (1969).

Westfield thereby enlarging the Westfield's length from 525 feet to 825 feet and its capacity from 16,500 tons deadweight to 34,000 tons.

To carry out this project, the former forebody of the Isanda was towed by tug across the Atlantic from Le Havre to a shipyard in Mobile where the Westfield was berthed. At that yard the stern portion of the Westfield was removed and joined to the former forebody of the Isanda. This joinder, as explained by the naval architect who supervised the project, was accomplished in the following manner (R. 128–9): "[w]hen the Isanda was towed to the Gulf, it was cut midway in the last number 10 tank, and we fabricated a new section from that point to the beginning of the aft-most bulkhead, or the aft-most bulkhead, had it been there. We constructed a half tank, and designed it in such a manner that we could make a transition between the wide beam of the Isanda and the narrow beam or breadth of the American ship, the T–2." More particularly, a transition piece of about 30 feet from fore to aft was constructed to connect the forebody of the Isanda with the stern section of the Westfield. A further part of the work consisted of removing the extreme lower portion of the bow of the Westfield—which was cylindrical in shape and weighed about 10 tons—and fastening it to the lower portion of the bow of the former forebody of the Isanda. This modification, while not necessary from a nautical standpoint, was effected to improve the speed performance of the jumboized tanker, i.e., the Westfield.[2] Eventually that tanker was called the Vantage Horizon and it continues to sail as a vessel to this day, carrying cargoes under the American flag.

When the former forebody of the Isanda was towed across the Atlantic to Mobile, it carried neither cargo nor crew and had the following characteristics among others: The centre bridge had been removed which deprived the forebody of any controlling or steering device. Its hull was in satisfactory condition. It had navigating lights but no power facilities making it necessary to power the lights by batteries or kerosene. It lacked any type of safety equipment and its aft bulkhead was open to the sea. Also it lacked many items such as mooring winches and lines, valves, piping and deck fittings—all of which had been removed prior to the crossing. The interior structure and the web frames of the wing tanks were in good condition and two pumps remained in the forward pump room. However, reach rods and pedestals

[2] As testified by the naval architect who supervised the project (R. 175, 177): "The work we did involved the jumboizing of the Westfield. In other words, the Westfield, as it was originally constructed, had a capacity of approximately 16,000 tons of cargo. When we removed the original forward portion of the Westfield and we installed the Isanda portion, the capacity of the vessel was now in the neighborhood of 34,000 * * * [dead] weight tons. That is why we refer to the process as 'jumboizing.' We made the Westfield larger. * * * [T]he forebody as we have been referring to it today, is called the Isanda and no where * * * [did] we ever make that portion of the vessel larger. The vessel that we increase[d] the capacity of and made larger was the Westfield. We jumboized the Westfield and made the Westfield larger."

had been removed from that room so that the pumps could not be operated. Further, the forebody had two masts which were in fair condition, a complete set of heating coils, a clean dry cargo hold, steel work in good condition, and tanks which were very clean and gas free. Finally, the record shows that the forebody as it crossed the ocean on its voyage to Mobile was capable of carrying only a limited amount of cargo because of its generally poor condition.

During the crossing, the forebody was under a marine hull and machinery insurance cover and prior thereto underwent a Lloyd's survey by a surveyor of Bureau Veritas, a world-wide marine insurance classification society. The marine insurance premium was $32,500.

When the forebody arrived at the entrance of the harbor at Mobile, it was joined by a riding crew of five seamen and charged pilotage. The riding crew served aboard from 8:00 A.M. to 6:00 P.M. on November 17, 1967 and performed the duties of opening tank tops and handling the mooring of the forebody. At Mobile plaintiff Vancor was represented by a ship's agent, Strachan Shipping Co. The transatlantic tow cost plaintiff $65,000.

Against this factual background it must be concluded that the forebody was not a "vessel" but rather a floating structure, as classified by Customs, and hence that plaintiff's claim must be dismissed. Dispositive in the court's view is *United States* v. *Bethlehem Steel Co. et al.*, 53 CCPA 142, C.A.D. 891 (1966),[3] *cert. den.* 386 U.S. 912 (1967), *reh. den.* 386 U.S. 987 (1967) which held that certain midbodies that were towed across the Atlantic to the United States were not vessels and hence not entitled to duty-free status.[4] The evidence with respect to the midbodies was set forth by this court in the following summary (54 Cust. Ct. at 3–4) which was adopted by the appellate court (53 CCPA at 143):

> It appears from the evidence that the midbodies in controversy were constructed in European shipyards in accordance with conventional designs, plans, and specifications prepared by naval architects which conformed to the accepted standards in the construction of watercraft generally and approved by governing bodies, such as the American Bureau of Shipping, the United States Coast Guard, and the United States Public Health Service.
>
> The midbodies were over 500 feet in length and had a cargo capacity of between 12,000 and 14,000 tons. In order to facilitate their transatlantic voyage, they were equipped with a temporary bow and additional stiffeners were used to strengthen the stern.

[3] Petition for rehearing denied October 6, 1966.

[4] In the *Bethlehem* case the appellate court reversed the decision of this court holding that the midbodies were "vessels." *Bethlehem Steel Company et al.* v. *United States*, 54 Cust. Ct. 1, C.D. 2500, 238 F. Supp. 483 (1964). The decision of the appellate court in *Bethlehem* was followed by this court in *Todd Shipyards Corporation* v. *United States*, *supra*, 63 Cust. Ct. 165.

Furthermore, each craft had sleeping accommodations for a crew of eight men, each of whom had signed ships' papers for the crossing. They were equipped with light, heat, power, food, radio facilities, and navigational lights and signals in order to comply with navigational rules of the road and to indicate that the craft were under tow, as required by law for vessels only. * * *

Upon their arrival in this country, the midbodies were suitable for use as vessels of the barge type for commercial use in the transportation of cargo. They were designed for ultimate use as cargo sections of self-propelled ore carriers on the Great Lakes.

The evidence also discloses that each craft carried marine insurance * * * which was secured for protection against damage or loss of the craft in transit and which also served as coverage for the crew of eight who manned the craft while crossing the ocean. In addition to the foregoing, the midbodies were equipped with liferafts, life preservers, anchor and chain, and a generator for light, heat, and messing.

In this setting, the appellate court stated (53 CCPA at 152):

* * * There is no evidence Congress intended, as appellant states, that "any floating object which has the capacity to carry merchandise must be accorded duty-free status." Second, that the midbodies are "staunch seagoing" structures does not establish that they are vessels. Rather, in all the cases cited, each of the "inferior craft" was capable of and designed to perform a sufficiently related function to "means of transportation" on water to qualify as a vessel. The liberality expressed in the law in interpreting the term "vessel" goes to the very fact that size and structure per se does not determine that a structure is a vessel.

The midbodies, at the time of importation, were not "barges" or equivalent to a barge as appellees would have us hold. They were precisely what the evidence shows, a midsection for a vessel. They were complete in nearly every respect, as pointed out supra. In order to tow them across the ocean they were fitted with temporary, sturdy fore and aft sections.

All of the evidence of record establishes that the midsections, at the time of importation, were not watercraft designed or intended as a means of transportation on water. Their sole resemblance to craft that have been held to be vessels (barges) and their qualification under a literal reading of the definitions advanced as vessels stems from the fact that temporary fore and aft sections were constructed for the tow across the ocean *to make possible their designed and intended use as midsections and not means of transportation.* We find our conclusion that the midbodies are not vessels is consistent with all of the cases discussed below and relied upon by appellees. [Emphasis in original.]

Continuing, the court observed that the midbodies made the trip across the ocean "for the exclusive purpose, and were designed and intended for no other reason than to serve as midsections of ore carriers. Thus considered, the midbodies were not vessels at the time of

importation, * * *." *Id.* at 153. Similarly, the present record establishes that the forebody made the trip across the ocean for the exclusive purpose, and was intended for no other reason than to be used in the rebuilding of an American flag vessel, i.e., the Westfield. What is more, if a comparison were to be made between the forebody in the present case and the midbodies in *Bethlehem*, the midbodies would be more like vessels than the forebody, considering that the midbodies carried a crew, had power facilities on board and were capable of carrying cargo, whereas the forebody had no crew, no power on board, and was capable of carrying only a limited amount of cargo because of its generally poor condition.

Plaintiff argues, however, that the present case is distinguishable from *Bethlehem* on the basis that the forebody "was born a vessel whereas the Bethlehem midbodies never achieved that status." (Br. p. 15.) However, this argument overlooks the fact that it was the condition of the forebody when it was imported that determines its status for tariff purposes and not its status at a prior stage before it was severed from the Isanda. And in its condition as imported the forebody—like the *Bethlehem* midbodies—had but one purpose—to be used as material for the jumboization of an American vessel and not as a means of transportation on water. To paraphrase what the appellate court said in *Bethlehem* (53 CCPA at 152), all the evidence of record establishes that the forebody at the time of importation was not watercraft intended as a means of transportation on water.

On another aspect, plaintiff points out that the forebodies of two French sister ships of the Isanda, the Isidora and Isara—which were intended to be used in the same way as the forebody of the Isanda, namely to jumboize American flag tankers—were entered at the port of Beaumont on March 11, 1966 and July 31, 1966, respectively, and were classified by Customs as "vessels" and thus exempt from duty. Plaintiff argues that since Customs at Beaumont treated these two forebodies as vessels and collected no duty, the action of Customs at Mobile in treating the virtually identical forebody of the Isanda involved here as a floating structure and imposing a duty of 17 percent ad valorem violated section 8 of the Constitution which specifies that "all Duties, Imposts and Excises shall be uniform throughout the United States."

With respect to this argument, it is to be noted that at the time the forebodies of the Isidora and Isara were entered at Beaumont, i.e., on March 11, 1966 and July 31, 1966, and exempted from duty by Customs on the basis that they were "vessels," an appeal by the government was pending from the decision of this court in *Bethlehem Steel Company et al.* v. *United States, supra*, 54 Cust. Ct. 1, holding that the midbodies in question were "vessels" and thus duty-free.

The facts, as set out in defendant's exhibit B, show that after the decision of the appellate court in *Bethlehem* in August 1966 reversing the trial court decision and holding the midbodies to be dutiable, the Bureau of Customs reconsidered its previous decision as to the tariff status of the forebodies of the Isidora and Isara and initiated various steps—which are detailed in the above exhibit—to collect duties on these two forebodies. However, as indicated in defendant's exhibit B, efforts by Customs to collect these duties have thus far been frustrated due to an apparent disagreement as to the ownership of the forebodies at the time they were imported into the United States.

In the present case, the basis for assessing duties on the forebody of the Isanda was that it was in conformance with the law as set forth by the appellate court in the *Bethlehem* case. Indeed, had Customs not assessed duties on the present forebody, such an omission would have been contrary to the law. From the standpoint of hindsight it might be argued that Customs' failure initially to assess duties on the forebodies of the Isidora and Isara was erroneous, but this cannot serve to relieve this plaintiff of its obligation to pay the duties legally due. Certainly, errors of judgment on the part of government officials or the clever use of corporate law by the owners of those two forebodies cannot now be used to defeat the legal requirement that the imported merchandise here involved be dutiable. Even an improper failure to collect duties on one occasion is scarcely a legal basis for refusing to collect duties clearly due on another occasion absent the applicability of the established and uniform practice doctrine, which has not been urged here and is clearly not applicable.[5]

Finally, plaintiff argues that Customs' failure to treat the forebody of the Isanda as a vessel is inconsistent with its treatment as a vessel of the forebody of the Stolt Dagali. The facts concerning this matter are as follows: In November 1964 the Stolt Dagali, a Norwegian vessel, collided in the Atlantic with another vessel causing the severance and sinking of the Stolt Dagali's stern section. The forebody of the Stolt Dagali remained intact and was towed into the port of New York where its cargo was unladen, after which it was towed back across the Atlantic to Europe. Customs treated the forebody as a vessel and thus allowed entry duty-free. Plaintiff claims that since no duty was assessed on that forebody no duty should have been assessed on the forebody of the Isanda. But there is a major difference between the status of the forebody here in issue and the forebody of the Stolt

[5] The established and uniform practice doctrine is covered by 19 U.S.C. 1315(d) which provides as follows:

(d) No administrative ruling resulting in the imposition of a higher rate of duty or charge than the Secretary of the Treasury shall find to have been applicable to imported merchandise under an established and uniform practice shall be effective with respect to articles entered for consumption or withdrawn from warehouse for consumption prior to the expiration of thirty days after the date of publication in the weekly Treasury Decisions of notice of such ruling; but this provision shall not apply with respect to the imposition of antidumping duties.

Dagali. For the forebody at bar was imported into the United States for the sole purpose of being used as material for the jumboization of an American vessel, whereas the forebody of the Stolt Dagali was brought into the United States solely as a means of transportation, i.e., to discharge its cargo and return to its country of origin for rework into another vessel.

For the reasons stated, it is concluded that the forebody at bar was properly classified by Customs as a floating structure under item 696.60. Therefore plaintiff's claim is overruled and judgment will be entered accordingly.

(C.D. 4628)

DOLLAR TRADING CORP. *v.* UNITED STATES

Interchangeable tools—Rotary files

INTERCHANGEABLE TOOLS FOR HAND OR MACHINE TOOLS—ROTARY FILES—ROTARY BURS

Rotary burs, classified by the regional commissioner of customs under item 649.43, TSUS, *held* properly dutiable under item 649.41, TSUS, as claimed by the importer. Rotary burs perform the same basic functions as rotary files, and are essentially a type of file for tariff classification purposes. Consequently, the rotary burs are properly dutiable under item 649.41, irrespective of the method used for forming the cutting ridges or teeth of the tool.

Court Nos. 70/39511, etc.

Port of New York

[Judgment for plaintiff.]

(Decided January 12, 1976)

Allerton deC. Tompkins for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Joseph I. Liebman*, trial attorney), for the defendant.

NEWMAN, Judge: This consolidated action concerns the proper dutiable classification of certain rotary tools invoiced as "Burrs" or "Rotary Cutters" (with or without other words of description). The merchandise was exported from the United Kingdom and West Germany during the years 1968 and 1970 and entered at the port of New York.

The importations were assessed with duty at the rate of 27 or 21 per centum ad valorem, depending upon the year of entry, under the

provision in item 649.43, TSUS, as modified by T.D. 68-9, for "Cutting tools (except tools provided for in item 649.41) * * *". Plaintiff claims that the rotary tools are properly dutiable at the rate of 5 or 4 per centum ad valorem, depending upon the year of entry, under item 649.41, TSUS, as modified by T.D. 68-9, providing for "Files and rasps, including rotary files and rasps".

For the reasons stated hereinafter, plaintiff's claim is sustained.

Statutes Involved

	Interchangeable tools for hand tools or for machine tools, including dies for wire drawing, extrusion dies for metal, and rock drilling bits:	
649.41	Files and rasps, including rotary files and rasps	* * *
649.43	Cutting tools (except tools provided for in item 649.41) with cutting part containing by weight over 0.2 percent of chromium, molybdenum, or tungsten, or over 0.1 percent of vanadium	* * *

The Record

The record comprises the testimony of one witness each for plaintiff and defendant: plaintiff's witness was Alvin Inwood, its purchasing agent and vice president; defendant's witness was Robert H. Thomas, chief product engineer for the Metal Removal Division of the Federal-Mogul Corporation. Additionally, the official papers were introduced in evidence by plaintiff, and numerous exhibits were introduced in evidence by both parties, viz: 24 exhibits by plaintiff; and 4 exhibits by defendant.

The imports are rotary cutting tools of carbon tool steel which were sold to the retail trade as "rotary burs", "bur sets", and as "burs".[1] These tools have a shank measuring ⅛ inch in diameter and a cutting head. The cutting head portion of the tools is of various sizes and shapes and has a "milled flute rotary bur type of tooth" (R.134). Rotary burs, such as the imports, are designed for deburing, metal removal, and metal finishing. The Coastal Abrasive and Tool Company, on whose behalf the plaintiff imported the rotary burs, sold rotary tools described as "rotary files", which were designed for the same uses as the imports, but had shanks ¼ inch or more in diameter.

[1] *Webster's Third New International Dictionary of the English Language* (1966) indicates that "burs" may also properly be spelled "burrs". At the trial, for the purposes of consistency, it was agreed that the former spelling ("burs") would be used (R.3).

The Coastal Abrasive and Tool Company distinguishes between "rotary files" and "rotary burs" solely on the basis of the diameter of the tool's shank (R.51, 60). Thus, Coastal's "rotary burs" have a shank diameter of ⅛ inch or less, while Coastal's "rotary files" have a shank diameter of ¼ inch or more. Defendant's witness Thomas distinguished between "rotary files" and "rotary burs" primarily on the basis of the method of forming the tool's cutting teeth. According to Thomas, "rotary files" have cutting teeth formed by hammer and chisel, while the teeth of "rotary burs" are formed by milling or grinding (R.114, 192). When asked on direct examination whether there are any distinctions between rotary files and rotary burs "aside from the method of manufacture", Thomas replied: "Not a great deal except the precision. I would suggest the rotary bur is a more precise type of tool, but it also is a keener cutting edge, and it allows resharpening" (R.114).

Opinion

In substance, item 649.41 covers files and rasps, including rotary files and rasps, which are interchangeable tools for hand or machine tools. The foregoing tools, covered by item 649.41, are expressly excepted from item 649.43. There is no dispute between the parties that the rotary tools in issue are interchangeable tools for hand or machine tools. Further, plaintiff does not contend that the rotary tools are "rasps". Therefore, the issue is narrowed to whether the articles are "rotary files" within the purview of item 649.41, and thus expressly excepted from item 649.43.

Plaintiff's position is that the rotary burs are used for the same purposes as rotary files (i.e., deburing, metal removal and metal finishing), and therefore should be dutiable under item 649.41. Defendant does not dispute that rotary burs and rotary files are closely related in use, but contends that burs are not classifiable as files because the latter have cutting edges formed by chisel cuts whereas the former have cutting edges formed by milling or grinding.

While there is lexicographic authority that the cutting ridges of files are formed by chisel cuts,[2] there are also many lexicographic authorities defining the term "file" without reference to the method of producing the cutting ridges. For example:

> *The Random House Dictionary of the English Language* (Unabridged) (1966):
>
> filed * * * 1. a long, narrow tool of steel or other metal having a series of ridges or points on its surfaces for reducing or smoothing surfaces of metal, wood, etc.

[2] *Webster's Third New International Dictionary of the English Language* (1966). See also: *Machinery's Handbook* (16th ed. 1959), page 1638; *The New American Machinist's Handbook* (1955), section 3-7.

Britannica World Language Edition of Funk & Wagnalls Standard Dictionary (1963):

> file * * * 1. A hard steel abrading or smoothing instrument with ridged cutting surfaces.

Dictionary of Technical Terms (1957):

> file * * * A hard steel instrument, made in various shapes and sizes, for smoothing wood or metal. * * *

Audels Mechanical Dictionary (1942):

> file. — A steel instrument, having its surface covered with sharp edged furrows or teeth, used for abrading or smoothing other substances; as, metals, wood, etc.

Additionally, the term "rotary file" has been defined as follows—

Webster's Third New International Dictionary of the English Language (1966):

> rotary file * * * a file of cylindrical or modified cylindrical form that is given a rotating rather than a reciprocating motion.

Further, it appears from the testimony of plaintiff's witness that the teeth of files may be formed by milling as well as by the chisel (R.43). This testimony is supported by *Mechanical Engineers' Handbook* (4th ed. 1941), which states (at page 1846):

> The *milled* files are true cutting tools. The teeth are formed by *milling* and have rake. * * * [Emphasis added.]

Moreover, plaintiff's witness testified that a rotary bur is a type of rotary file (R.49–50). Significantly, this testimony is strongly buttressed by the United States Tariff Commission's *Summaries of Trade and Tariff Information* (1968), which summaries were "Prepared in Terms of the Tariff Schedules of the United States (TSUS)".[3] So far as pertinent, the summaries state (schedule 6, volume 6, pages 67–68):

> Description and uses
>
> This summary covers hand and machine files and rasps (including rotary files *and burrs*), which are cutting tools used for smoothing and shaping metal, wood, and other materials. Although rasps are separately named in the TSUS, they are actually a type of file. *Burrs are a type of file which are usually referred to by name rather than as files*; they are therefore referred to separately in this summary. [Emphasis added.]
>
> * * * * * * *
>
> Files and rasps that are interchangeable tools (item 649.41) are referred to as "machine files" in this summary. These files

[3] The *Summaries of Trade and Tariff Information* have been referred to by our appellate court as an aid in determining the scope of tariff provisions. See e.g., *American Bristle & Hair Drawing Co., Keer Maurer & Co. v. United States*, 59 CCPA 104, 108, C.A.D. 1048, 458 F. 2d 542, 527 (1972); *Tanross Supply Co. Inc. v. United States*, 58 CCPA 26, 31, C.A.D. 1000, 433 F. 2d 1332. 1336 (1970). See also *Lyons Export & Import, Inc. v. United States*, 59 CCPA 142, 144, C.A.D. 1056, 461 F. 2d 830, 831 (1972).

are made in a number of forms. Files quite similar to hand files are used in power-driven reciprocating filing machines. File bands, for use in band-filing machines, are composed of short file segments mounted on a continuous steel band. Rotary files and burrs are designed for use in electric and pneumatic hand tools and other power-driven equipment. These files consist of a short shaft on which is mounted a head in a ball, cone, cylinder, or similar shape. Usually file teeth are cut on the periphery of the head. Generally the method used in forming the teeth determines whether a tool is a file or a burr. Rotary files and burrs are used for forming fillets, chamfering edges, removing burrs, elongating holes, and similar operations.

In light of the Tariff Commission's significant comment covering the scope of item 649.41, it is apparent that irrespective of the method of forming the teeth, the drafters of the tariff schedules regarded rotary burs as a type of rotary file, and intended that such burs be classifiable under item 649.41.

For all the reasons stated herein, I conclude that the imported rotary burs are within the scope of item 649.41, and plaintiff's claim under that provision is sustained.

Judgment will be entered accordingly.

(C.D. 4629)

ANDREW AKINS *v.* UNITED STATES

Opinion on Cross-Motions for Summary Judgment

Court No. 74-11-03228

Port of Calais (Portland, Me.)

[Judgment for defendant.]

(Decided January 26, 1976)

David C. Crosby, Thomas N. Tureen and Barry A. Margolin for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

BOE, Chief Judge: Plaintiff has moved for summary judgment under rule 8.2 of this court. Defendant, agreeing that no genuine issue of fact exists, has cross-moved for summary judgment in its favor.

From the pleadings and from the testimony submitted by affidavits, it appears that on July 16, 1974, plaintiff, a United States citizen, an Indian by race and a member of the Penobscot nation, entered

the United States from Canada with hiking boots purchased in Canada for his own personal use. The merchandise in question was assessed at Calais, Maine border station with duty in the sum of $1.20 pursuant to item 700.45, Tariff Schedules of the United States, which provides:

SCHEDULE 7.—SPECIFIED PRODUCTS; MISCELLANEOUS AND NONENUMERATED PRODUCTS

PART 1. – FOOTWEAR; * * *

SUBPART A. – Footwear

* * * * * * *		
Footwear, of leather (except footwear with uppers of fibers):		
* * * * * * *		
Other:		
* * * * * * *		
For other persons:		
* * * * * * *		
Other:		
* * * * * * *		
700.45	Valued over $2.50 per pair.	10% ad val.

The assessed duty was paid by the plaintiff and protest formally made in which an exemption from any duty was claimed pursuant to article III of the Treaty of Amity, Commerce and Navigation, 8 Stat. 116, 117 (1794) (hereinafter referred to as the Jay Treaty). The protest was denied and a summons timely filed thus commencing the within civil action.

The defendant in its cross-motion denies the contention of the plaintiff and claims as its principal defense that article III of the Jay Treaty has been abrogated by the War of 1812.

I

Article III of the Jay Treaty provides:

> It is agreed that it shall at all times be free to his Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America (the country within the limits of the Hudson's bay Company only excepted) and to navigate all the lakes, rivers and waters thereof, and freely to carry on trade and commerce with

each other. But it is understood, that this article does not extend to the admission of vessels of the United States into the sea-ports, harbours, bays, or creeks of his Majesty's said territories; nor into such parts of the rivers in his Majesty's said territories as are between the mouth thereof, and the highest port of entry from the sea, except in small vessels trading bona fide between Montreal and Quebec, under such regulations as shall be established to prevent the possibility of any frauds in this respect. Nor to the admission of British vessels from the sea into the rivers of the United States, beyond the highest ports of entry for foreign vessels from the sea. The river Mississippi shall, however, according to the treaty of peace, be entirely open to both parties; and it is further agreed, that all the ports and places on its eastern side, to whichsoever of the parties belonging, may freely be resorted to and used by both parties, in as ample a manner as any of the Atlantic ports or places of the United States, or any of the ports or places of his Majesty in Great-Britain.

All goods and merchandize whose importation into his Majesty's said territories in America, shall not be entirely prohibited, may freely, for the purposes of commerce, be carried into the same manner aforesaid, by the citizens of the United States, and such goods and merchandize shall be subject to no higher or other duties, than would be payable to his Majesty's subjects on the importation of the same from Europe into the said territories. And in like manner, all goods and merchandize whose importation into the United States shall not be wholly prohibited, may freely, for the purposes of commerce, be carried into the same, in the manner aforesaid, by his Majesty's subjects, and such goods and merchandize shall be subject to no higher or other duties, than would be payable by the citizens of the United States on the importation of the same in American vessels into the Atlantic ports of the said states. And all goods not prohibited to be exported from the said territories respectively, may in like manner be carried out of the same by the two parties respectively, paying duty as aforesaid.

No duty of entry shall ever be levied by either party on peltries brought by land, or inland navigation into the said territories respectively, nor shall the Indians passing or repassing with their own proper goods and effects of whatever nature, pay for the same any impost or duty whatever. But goods in bales, or other large packages, unusual among Indians, shall not be considered as goods belonging bona fide to Indians.[1]

* * * * * * *

[1] It is further provided under article XXVIII of the Jay Treaty that article III is permanent in nature. In 1796, the United States and Great Britain further agreed to the explanatory article of May 4, 1796, 8 Stat. 130, which provided in part:

That no stipulations in any treaty subsequently concluded by either of the contracting parties with any other state or nation, or with any Indian tribe, can be understood to derogate in any manner from the rights of free intercourse and commerce, secured by the aforesaid third article of the treaty of amity, commerce and navigation, to the subjects of his Majesty and to the citizens of the United States, and to the Indians dwelling on either side of the boundary line aforesaid; but that all the said persons shall remain at full liberty freely to pass and repass by land or inland navigation, into the respective territories and countries of the contracting parties, on either side of the said boundary line, and freely to carry on trade and commerce with each other, according to the stipulations of the said third article of the treaty of amity, commerce and navigation.

There has been a lack of uniformity with respect to the effect of war upon a treaty existing between belligerent countries. Authorities on international law have expressed divergent opinions. Although in early years the doctrine generally prevailed that war, ipso facto, abrogated all treaties uniformally, it has become more universally accepted that the abrogation of a treaty provision is dependent upon its intrinsic nature and character.

In the early history of this country, the Supreme Court in the case of *Society for the Propagation of the Gospel* v. *New Haven*, 21 U.S. (8 Wheat.) 206, 219 (1823), adhering to a more flexible construction with respect to the doctrine relating to treaty abrogation, therein stated:

> But we are not inclined to admit the doctrine urged at the bar, that treaties become extinguished, *ipso facto*, by war between the two governments, unless they should be revived by an express or implied renewal on the return of peace. Whatever may be the latitude of doctrine laid down by elementary writers on the law of nations, dealing in general terms, in relation to this subject, we are satisfied, that the doctrine contended for is not universally true. There may be treaties of such a nature, as to their object and import, as that war will put an end to them; but where treaties contemplate a permanent arrangement of territorial, and other national rights, or which, in their terms, are meant to provide for the event of an intervening war, it would be against every principle of just interpretation to hold them extinguished by the event of war. If such were the law, even the treaty of 1783, so far as it fixed our limits, and acknowledged our independence, would be gone, and we should have had again to struggle for both upon original revolutionary principles. Such a construction was never asserted, and would be so monstrous as to supersede all reasoning. We think, therefore, that treaties stipulating for permanent rights, and general arrangements, and professing to aim at perpetuity, and to deal with the case of war as well as peace, do not cease on the occurrence of war, but are, at most, only suspended while it lasts; and unless they are waived by the parties, or new and repugnant stipulations are made, they revive in their operation at the return of peace.

The decision in the foregoing case affirmed the right of a British corporation to continue to own and hold lands in the state of Vermont by virtue of the protective provisions of article VI of the treaty of 1783, 8 Stat. 80, 83, and confirmed by article IX of the Jay Treaty. Inasmuch as the provisions of the respective treaties were construed as relating to and affecting vested property rights to be owned and transferred in perpetuity, the provisions thereof were held not to be abrogated by the War of 1812.

The decision of the Supreme Court in *Society for the Propagation of the Gospel* v. *New Haven, supra*, relating as aforesaid to the survival

of vested property rights confirmed by article IX of the Jay Treaty, was applied in the case of *McCandless* v. *United States ex rel. Diabo*, 25 F. 2d 71 (3d Cir. 1928), to the right granted by article III of the Jay Treaty to the subjects of Great Britain, United States citizens and all Indians to "pass" and "repass" the boundary between Canada and the United States. The court of appeals therein found that an Indian, born on a reservation in Canada, who made a number of trips from Canada to the United States in the course of his employment was not in violation of existing immigration laws. In so doing, the court concluded that the provision of article III granting the right to "pass" and "repass" was a permanent and vested right which at the most was only suspended and not abrogated by the War of 1812.

By way of historical background, the court pointed out that the boundary line between Canada and the United States—defined by the Jay Treaty—passed through lands held and occupied by a confederation of Indian tribes or nations.[2]

Throughout the Revolutionary War as well as the War of 1812, the confederacy as a whole remained neutral leaving to the individual tribe the discretion to side with either belligerent. It would appear that the apparent neutrality of the Indian confederacy as a whole during the respective periods of hostility between the United States and Great Britain influenced the court of appeals in its conclusion that "* * * there was no reason why either of the contending nations in 1812 should desire to change the status of the Six Nations and thereby anger and drive them into hostilities." 25 F.2d at 72. See also *Akins* v. *Saxbe*, 380 F. Supp. 1210, 1212–13 (N.D. Me. 1974).

Plaintiff has urged that the *McCandless* decision is controlling of the issue involved in the case at bar, notwithstanding the subsequent decision of the United States Supreme Court in the case of *Karnuth* v. *United States ex rel. Albro*, 279 U.S. 231 (1929). In the *Karnuth* case, two Canadian residents in support of their entry into the United States free from existing immigration restrictions invoked specifically the first paragraph of article III of the Jay Treaty granting: "To His Majesty's subjects, and to the citizens of the United States, and also to the Indians dwelling on either side of the said boundary line, freely to pass and repass by land or inland navigation, into the respective territories and countries of the two parties, on the continent of America * * *."

The court citing with approval the decision in the case of *Society for the Propagation of the Gospel* v. *New Haven*, *supra*, further defined the distinction between treaty provisions creating vested property

[2] The Penobscot tribe of which the plaintiff is a member was one of the nations comprising this confederacy.

rights and those rights and privileges promissory and prospective in character. In so doing, the court stated (279 U.S. at 239–42):

> These cases are cited by respondents and relied upon as determinative of the effect of the War of 1812 upon Article III of the treaty. This view we are unable to accept. Article IX and Article III relate to fundamentally different things. Article IX aims at perpetuity and deals with existing rights, vested and permanent in character, in respect of which, by express provision, neither the owners nor their heirs or assigns are to be regarded as aliens. These are rights which, by their very nature, are fixed and continuing, regardless of war or peace. But the privilege accorded by Article III is one created by the treaty, having no obligatory existence apart from that instrument, dictated by considerations of mutual trust and confidence, and resting upon the presumption that the privilege will not be exercised to unneighborly ends. It is, in no sense, a vested right. It is not permanent in its nature. It is wholly promissory and prospective and necessarily ceases to operate in a state of war, since the passing and repassing of citizens or subjects of one sovereignty into the territory of another is inconsistent with a condition of hostility. See 7 Moore's Digest of International Law, § 1135; 2 Hyde, International Law, § 606. The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war. Disturbance of peaceful relations between countries occasioned by war, is often so profound that the accompanying bitterness, distrust and hate indefiniteiy survive the coming of peace. The causes, conduct or result of the war may be such as to render a revival of the privilege inconsistent with a new or altered state of affairs. The grant of the privilege connotes the existence of normal peaceful relations. When these are broken by war, it is wholly problematic whether the ensuing peace will be of such character as to justify the neighborly freedom of intercourse which prevailed before the rupture. It follows that the provision belongs to the class of treaties which does not survive war between the high contracting parties * * *.
>
> * * * * * * *
>
> These expressions and others of similar import which might be added, confirm our conclusion that the provision of the Jay Treaty now under consideration was brought to an end by the War of 1812, leaving the contracting powers discharged from all obligation in respect thereto, and, in the absence of a renewal, free to deal with the matter as their views of national policy, respectively, might from time to time dictate.
>
> We are not unmindful of the agreement in Article XXVIII of the Treaty "that the first ten articles of this treaty shall be permanent, and that the subsequent articles, except the twelfth, shall be limited in their duration to twelve years." It is quite apparent that the word "permanent" as applied to the first ten articles was used to differentiate them from the

subsequent articles—that is to say, it was not employed as a synonym for "perpetual" or "everlasting," but in the sense that those articles were not limited to a specific period of time, as was the case in respect of the remaining articles. Having regard to the context, such an interpretation of the word "permanent" is neither strained nor unusual. See *Texas, & Railway Co.* v. *Marshall*, 136 U.S. 393, 403; *Bassett* v. *Johnson*, 2 N.J. Eq. 154, 162.

Because of the possibility of treasonable intercourse that might occur during hostilities as a result of unrestricted passage and because such right of free passage might "be incompatible with conditions following the termination of war," the court determined that the provisions of article III relating to "passing" and "repassing" could not be deemed vested property rights but rather promissory and prospective in character and, accordingly, abrogated by the War of 1812.

It is deserving of note that in the cases of *McCandless* v. *United States* and *Karnuth* v. *United States*, previously referred to, the issue in question was restricted to the provisions of the first paragraph of article III relating solely to the free "passing" and "repassing" of persons across the boundary between the United States and Canada. However, in the case of *United States* v. *Garrow*, 24 CCPA 410, 88 F. 2d 318 (1937), *cert. denied*, 302 U.S. 695 (1937), the Court of Customs and Patent Appeals considered the issue closely akin to that existing in the case at bar. In the *Garrow* case an Indian, residing in Canada, entered the United States bringing with her certain baskets. Protesting the imposition of a duty on the baskets pursuant to paragraph 411 of section 1 of the Tariff Act of 1930, the plaintiff claimed an exemption therefrom pursuant to the provisions of article III of the Jay Treaty. The court, following the reasoning of the United States Supreme Court in the *Karnuth* decision, held that the provisions of article III of the Jay Treaty had been abrogated by the War of 1812, and, accordingly, the protestant was subject to the duty exacted on the merchandise carried with her.[3]

In its decision, the court stated (24 CCPA at 418):

> The view of the Supreme Court on this interesting question, expressed in the case last cited, was confirmatory of views held by that court from the initiation of our Government. See *Society for the Propagation of the Gospel in Foreign Parts* v. *Town of New Haven and William Wheeler*, 8 Wheat. 464 (494).
>
> It was also obviously in conformity with the current of authority both in the United States and England. Moore's International Law Digest, Vol. V, paragraph 779.

[3] In the *Garrow* case, the court pointed out that an appeal did not result in the *McCandless* case possibly because of the "fact that on April 2, 1928, an act of Congress was approved which provided that the Immigration Act of 1924 should not apply to Indians crossing the international border (45 Stat. 401)." 24 CCPA at 416.

The plaintiff, however, urges that the reliance of the court in the *Garrow* decision upon the *Karnuth* case was misplaced in that the provision of article III of the Jay Treaty relating to the exemption of Indians from duty when carrying their personal belongings and effects is separable from that portion of the article relating to the free passage of the United States citizens, British subjects and Indians. This court recognizes that the abrogation of one provision of a treaty necessarily does not strike down the entire treaty nor other independent provisions thereof which should properly survive. *Techt* v. *Hughes*, 128 N.E. 185 (N.Y. Ct. App. 1920), *cert. denied*, 254 U.S. 643 (1920). However, viewing the respective provisions of article III independently as well as in their entirety, it would appear that a consistent logical construction thereof would preclude the application of the doctrine of separability to the provisions of the treaty here under consideration.

The rationale of the *Karnuth* decision is predicated upon the premise that the possibility of treasonable intercourse in the time of war justifies the abrogation of that portion of article III relating to free "passing" and "repassing" of the person. The *Garrow* decision has extended that reasoning to apply to that portion of article III relating to the exemption from duty upon "personal belongings and effects" of Indians when "passing" or "repassing" the boundary between the United States and Canada. The possibility of treasonable intercourse occurs as the result of the physical movement of the individual. It would be incredulous to assume that the act of carrying "personal goods and effects" while "passing" or "repassing" would cause the possibility of treasonable intercourse to be less likely. The carrying of "personal belongings and effects," and the exemption of duty thereon, as referred to in article III of the Jay Treaty, is dependent on the physical passage of the individual. If, therefore, the right of physical passage is abrogated by war, it logically follows that the right and privilege relating to the carrying of "personal goods and effects" and the exemption from duty thereon, which are an integral part of the physical movement, are likewise abrogated.

Nor can this court accept the argument urged by the plaintiff that the historical friendship between the Penobscot tribe and the United States would make the possibility of treasonable intercourse unlikely, thereby removing the reason for the abrogation of article III. Neither the Jay Treaty nor the *Karnuth* nor *Garrow* decisions contemplate any distinction between Indians who may have been friendly or unfriendly to the American colonies or the American government. Nor has the distinction been made between Indians residing within the territorial boundaries of Canada or of the United States.

Throughout the entire provisions of article III and in each of the foregoing decisions, reference has been made to United States citizens, to subjects of Great Britian and to Indians as respective classes. To differentiate between persons, groups or tribes in each of said classes who may have been friendly or unfriendly would require the adoption of a subjective test and standard as to the possibility of treasonable intercourse which would be impossible of determination.

This court is likewise unwilling to accept the observation of the court of appeals in the *McCandless* case that Indians, not signatories to the treaty but third party beneficiaries thereunder, should be afforded greater rights than the signatories themselves. The contracting parties in executing the Jay Treaty were the United States and Great Britain. The citizens and subjects of each country including the Indians residing within their respective territories continued to enjoy such rights and privileges provided by article III thereof only as long as the agreement itself remained binding between the original contracting parties. No issue is taken with the several decisions cited by the plaintiff in which it has been repeatedly held that the promises and obligations of the United States government to the Indian resident within its boundaries must be upheld and that the abrogation of such promises cannot be lightly implied. *Menominee Tribe of Indians* v. *United States*, 391 U.S. 404 (1968); *United States* v. *Payne*, 264 U.S. 446 (1924); *Lone Wolf* v. *Hitchcock*, 187 U.S. 553 (1903). However, an examination of the authorities in question will reveal that the statement so often enunciated by the courts has been applicable to those cases involving treaties made by the United States government directly with the Indian tribe or tribes. No parallel can be drawn therefrom with the applicable provisions of article III of the Jay Treaty under consideration herein.

In this connection it is of interest to note the construction placed by the courts of Canada on the question here in issue. In the case of *Francis* v. *The Queen*, 4 Dominion Law Reports 760 (1955), a petition was filed in the Exchequer Court of Canada by a Canadian Indian seeking an exemption under the provisions of article III of the Jay Treaty from a duty imposed on personal goods brought by him from the United States. The court, holding that the provisions of article III had been abrogated by the War of 1812, cited with approval the decisions of *Karnuth* v. *United States*, *supra*, and *United States* v. *Garrow*, *supra*, stating (4 D.L.R. at 776):

> * * * While it is true that these cases are not binding upon me, the reasons given in each case commend themselves to me and with respect I shall adopt them in this case. * * *[4]

[4] On appeal the Supreme Court of Canada, 3 D.L.R. (2d) 641 (1956), although affirming the trial court, predicated its decision on the premise that the Canadian law required such rights and privileges as provided in article III of the Jay Treaty to be first implemented and sanctioned by legislation. Such implementation had not been enacted.

The plaintiff in his presentation of all issues that might serve to preserve the continued viability of article III of the Jay Treaty has urged that the provisions thereof, at the most, only were suspended during the War of 1812. Contending that the exemption of the personal goods and effects of Indians from duty is a commercial provision, attention has been directed to *The Sophie Rickmers*, 45 F.2d 413 (S.D.N.Y. 1930). A careful examination of this case, however, would not lead to the conclusion offered by the plaintiff. In the aforecited case a German ship entering the port of New York was subjected to a tonnage duty pursuant to existing statutes. Plaintiff's contention that the ship was exempt from duty by virtue of the Hanseatic Convention of 1827 and the Prussian Treaty of 1828 presented the issue as to whether the said treaties were abrogated by World War I. In its decision the court recognized that treaties which are commercial in character may be considered either suspended or abrogated at the option of the belligerents. Accordingly, in view of the intention of the contracting parties determined from the surrounding controlling circumstances, the treaties there in question were held to have been only suspended by World War I and in full force and effect after the termination of hostility. In its determination, the court clearly distinguishing the decision of the Supreme Court in the case of *Karnuth* v. *United States*, *supra*, stated (45 F.2d 421):

> The holding in Karnuth v. United States, 279 U.S. 231, 49 S. Ct. 274, 73 L. Ed. 677, does not, in my judgment, cover the present facts. In that case, it was decided that article 3 of the Jay Treaty of 1783, providing for free passage of American and British nationals across the Canadian border, had been annulled and not merely suspended by the War of 1812. The theory of the decision clearly distinguished it from the case at bar. The free passage of persons, as was said by the court, "* * * is inconsistent with a condition of hostility. * * * The reasons for the conclusion are obvious—among them, that otherwise the door would be open for treasonable intercourse. And it is easy to see that such freedom of intercourse also may be incompatible with conditions following the termination of the war." 279 U.S. 239, 49 S. Ct. 274, 277, 73 L. Ed. 677.
>
> It can readily be understood that the mere occurrence of war should have that necessary effect on rights of free passage and repassage. Before the war, each state may have felt secure in the expectation of a lasting peace. The incidence of war destroys that expectation; what has happened once may happen again. It is therefore necessary to reconsider the wisdom of allowing free passage over our unprotected borders and, in the meantime, not to recognize a treaty right thereto. The present case presents no such problem. If the question involved were the complete exclusion of German vessels, the analogy might be a fair one. The issue here is different. The right of entry is not denied; the only question presented is the treaty limitation on the power to tax.

> Taxation or no taxation cannot vitally affect the course of trade, for the taxes imposed are not so large as to be prohibitory. It is difficult to see how reciprocity of tonnage taxation can in any way affect the national safety, the right of entry itself being in no way denied. * * *

In the *Rickmers* case, the sole issue under consideration involved the continued validity of the treaty restrictions to assess a tonnage tax. Neither the exclusion of the vessel was in issue nor, in fact, was the right of entry denied. In the instant case, on the other hand, the duty exemption provided for in the third paragraph of article III related to the "personal goods and effects" of Indians carried when "passing" or "repassing" the boundary. The application of the duty exemption only to the "personal goods and effects" of the Indians when "passing" and "repassing" as distinguished from "goods in bales, or other large packages" serves to emphasize the intent that such a right and privilege was not commercial but personal in character and interwoven with the actual physical passage of the Indians—a right separately and individually granted under the provisions of paragraph 1 of article III. If the right of "passing" and "repassing" of persons lends itself to the possibility of treasonable intercourse, as held in the *Karnuth* case, the joinder therewith of a duty exemption on "personal goods and effects" when so "passing" or "repassing," indeed, cannot be said to remove that possibility.

This court, accordingly, concludes that the decisions in *Karnuth* v. *United States*, *supra*, and *United States* v. *Garrow*, *supra*, are properly determinative of the facts and issues in the instant action and that the applicable provisions of article III of the Jay Treaty, relied on by the plaintiff herein, have been abrogated by the War of 1812.

II

Although the foregoing determination would preclude the necessity to consider further issues in connection with its decision, the court is desirous of addressing itself to an additional question presented briefly by the defendant in the case at bar. I refer to the relationship existing between a treaty of the United States and a subsequent expression of Congress evidencing an inconsistent provision.

Article VI of the Constitution of the United States provides:

> This Constitution, **and** the laws of the United States which shall be made in pursuance thereof, and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land * * *.

It has been repeatedly held that the foregoing constitutional provision in designating a treaty and a congressional act as the supreme law of the land places both in parity with each other. *Reid* v.

Covert, 354 U.S. 1 (1957); *Whitney* v. *Robertson*, 124 U.S. 190 (1888).

However, when each instrument relates to a common subject matter and at the same time contains inconsistent provisions, some standard must be adopted to determine which shall prevail. In construing such conflicting instruments every reasonable effort will be made by the courts to interpret them in a manner so as to give effect to both. *Whitney* v. *Robertson*, *supra*; *Cook* v. *United States*, 288 U.S. 102 (1933).

In the case of a nonself-executing treaty, little difficulty is encountered where it appears that the treaty instrument may be in conflict with statutory provisions. Inasmuch as it is the function and obligation of the Congress to implement the nonself-executing treaty by appropriate legislation, it follows that the Congress thereafter may amend, modify and even rescind its former implementing legislation.

Thus, it is only with respect to the relationship between self-executing treaties and conflicting congressional acts that a resolution as to their respective applicability must be made. The distinction between nonself-executing and self-executing treaties and their respective relationship with subsequent acts of Congress has been clearly stated in the case of *Whitney* v. *Robertson*, *supra* at 194:

> * * * A treaty is primarily a contract between two or more independent nations, and is so regarded by writers on public law. For the infraction of its provisions a remedy must be sought by the injured party through reclamations upon the other. When the stipulations are not self-executing they can only be enforced pursuant to legislation to carry them into effect, and such legislation is as much subject to modification and repeal by Congress as legislation upon any other subject. If the treaty contains stipulations which are self-executing, that is, require no legislation to make them operative, to that extent they have the force and effect of a legislative enactment. Congress may modify such provisions, so far as they bind the United States, or supersede them altogether. By the Constitution a treaty is placed on the same footing, and made of like obligation, with an act of legislation. Both are declared by that instrument to be the supreme law of the land, and no superior efficacy is given to either over the other. When the two relate to the same subject, the courts will always endeavor to construe them so as to give effect to both, if that can be done without violating the language of either; but if the two are inconsistent, the one last in date will control the other, provided always the stipulation of the treaty on the subject is self-executing. If the country with which the treaty is made is dissatisfied with the action of the legislative department, it may present its complaint to the executive head of the government, and take such other measures as it may deem essential for the protection of its interests. The courts can afford no redress. * * *

Again, in the case of *Reid* v. *Covert*, *supra* at 18, Mr. Justice Black, speaking for the Court, stated:

> This Court has also repeatedly taken the position that an Act of Congress, which must comply with the Constitution, is on a full parity with a treaty, and that when a statute which is subsequent in time is inconsistent with a treaty, the statute to the extent of conflict renders the treaty null. It would be completely anomalous to say that a treaty need not comply with the Constitution when such an agreement can be overridden by a statute that must conform to that instrument.

An exhaustive consideration of this question was made by the Supreme Court of the United States in the case of *Chae Chan Ping* v. *United States*, 130 U.S. 581 (1889). In the foregoing case, commonly known as "*The Chinese Exclusion Case*" challenge was made to the congressional act of 1888 "* * * as being in effect an expulsion from the country of Chinese laborers in violation of existing treaties between the United States and the government of China, and of rights vested in them under the laws of Congress" (at 599–600). The Court (at 600), in upholding the validity of the act in question, stated:

> * * * The treaties were of no greater legal obligation than the act of Congress. By the Constitution, laws made in pursuance thereof and treaties made under the authority of the United States are both declared to be the supreme law of the land, and no paramount authority is given to one over the other. A treaty, it is true, is in its nature a contract between nations, and is often merely promissory in its character, requiring legislation to carry its stipulations into effect. Such legislation will be open to future repeal or amendment. If the treaty operates by its own force, and relates to a subject within the power of Congress, it can be deemed in that particular only the equivalent of a legislative act, to be repealed or modified at the pleasure of Congress. In either case the last expression of the sovereign will must control.

Recognizing that national interest may demand that the Congress exercise the authority imposed upon it by the Constitution, notwithstanding that such an act might contravene prior treaty commitments, the Court (at 600–601), continued:

> * * * It will not be presumed that the legislative department of the Government will lightly pass laws which are in conflict with the treaties of the country; but that circumstances may arise which would not only justify the Government in disregarding their stipulations, but demand in the interests of the country that it should do so, there can be no question. Unexpected events may call for a change in the policy of the country. * * *

The Court in the *Chinese Exclusion Case* clearly differentiated between rights and interests created by a treaty which may have

become vested and rights which are personal in character and pertain to privileges to be exercised only by the individual in the future. The Court (at 601–602), further stated:

> This act, as seen, applied in terms only to the future. Of course, whatever of a permanent character had been executed or vested under the treaties was not affected by it. In that respect the abrogation of the obligations of a treaty operates, like the repeal of a law, only upon the future, leaving transactions executed under it to stand unaffected. The validity of this legislative release from the stipulations of the treaties was of course not a matter for judicial cognizance. The question whether our government is justified in disregarding its engagements with another nation is not one for the determination of the courts. * * *

The Court (at 609), continued:

> * * * The rights and interests created by a treaty, which have become so vested that its expiration or abrogation will not destroy or impair them, are such as are connected with and lie in property, capable of sale and transfer or other disposition, not such as are personal and untransferable in their character. * * *

In light of the foregoing, it is proper to examine the successive statutes relating to the same rights and privileges provided for in article III of the Jay Treaty enacted by the Congress pursuant to the powers vested in it by article I, section 8 of the Constitution providing:

> The Congress shall have power to lay and collect taxes, duties, imposts and excises, * * *
> To regulate commerce with foreign nations, and among the several States, and with the Indian tribes; * * *

In 1799 the Congress enacted legislation, the provisions of which closely pattern the language contained in article III of the Jay Treaty, section 105 thereof providing:

> *And be it further enacted*, That no duty shall be levied or collected on the importation of peltries brought into the territories of the United States, nor on the proper goods and effects of whatever nature, of Indians passing, or repassing the boundary line aforesaid, unless the same be goods in bales or other large packages unusual among Indians, which shall not be considered as goods belonging bona fide to Indians, nor be entitled to the exemption from duty aforesaid. * * * [1 Stat. 627, 702.]

Inasmuch as the provisions of article III of the Jay Treaty were self-executing, the statutory provisions aforequoted were not enacted for the purpose of implementing the treaty but, as stated in section 104 of the act, to conform the statutes of the United States to the treaty provisions.

From time to time thereafter Congress enacted repeated legislative acts providing for the same duty exemption as contained in section

105 of the statute aforequoted. The 43d Congress of 1873–1874 enacted section 2515 as a part of the Statutes at Large entitled Revised Statutes of the United States. This section incorporated the identical language found in section 105 of the act of 1799. In a revision of 1878, section 2515 was again repeated. In the Tariff Act of March 3, 1883, 22 Stat. 488, 523, section 2512 was enacted which again incorporated substantially the same language as contained in previous statutory sections.

It was not until the enactment of the Tariff Act of 1890, 26 Stat. 567, 608, that a substantial change in language appears. In paragraph 674 of section 2 thereof, the prior statute was amended to provide:

> Peltries and other usual goods and effects of Indians passing or repassing the boundary line of the United States, under such regulations as the Secretary of the Treasury may prescribe: *Provided*, That this exemption shall not apply to goods in bales or other packages unusual among Indians.

In the tariff revision of 1894, 28 Stat. 509, 543, paragraph 582 was enacted reincorporating the identical language contained in the Tariff Act of 1890, aforequoted.

It will be noted that the provisions of the Tariff Act of 1890 and their reincorporation in the tariff revision of 1894 changed significantly the provisions of the original congressional act of 1799. Instead of permitting the duty-free entry of *all* peltries brought into the territories of the United States, the latter provision restricted the exemption only to "peltries and other usual goods and effects" of Indians, subject to such regulations as the Secretary of the Treasury may prescribe.

In the tariff act enacted by the Congress in 1897, 30 Stat. 151, 213, section 34 thereof repealed, *inter alia*, paragraph 582 of the Tariff Act of 1894 and all other acts inconsistent therewith.

Since the year 1897, neither the statutes nor the tariff schedules of the United States have provided an exemption from the payment of duty by Indians "passing" or "repassing" across the boundary between the United States and Canada with their personal belongings or their own proper goods. On the contrary, articles of personal property such as hunting boots, the merchandise which is the subject of the instant action, is the subject of duty (item 700.45, TSUS).[5]

As this court has hereinbefore indicated, the right granted by article III of the Jay Treaty as well as by subsequent congressional acts cannot be construed other than as a privilege personal and nontransferable in character. The abrogation or recision of this right in no manner affected the interest of those persons who heretofore had

[5] Although personal exemptions exist under the present Tariff Schedules of the United States, no evidence has been submitted to the court that the particular merchandise herein would fall within those provisions.

exercised this privilege. In short, the duty-free privilege granted by the Jay Treaty as well as by statute did not confer upon the beneficiaries a vested interest of such a permanent character that a recision thereof constituted an abrogation of an executed proprietory right.

The self-executing provisions of article III of the Jay Treaty being only promissory in character, the question presented is the effect of subsequent "expressions" of the Congress upon the specific duty-free privileges granted thereunder.

Had the Congress by legislation expressly and directly repealed the duty-free privilege provided in article III of the Jay Treaty, no doubt would exist that such a statute, enacted subsequent in time to the treaty and constituting the "* * * last expression of the sovereign * * *," would control and render the treaty provisions a nullity, *Reid* v. *Covert, supra; Chae Chan Ping* v. *United States, supra.* However, as previously referred to herein, commencing in 1799, the Congress in the exercise of the exclusive power delegated to it by the Constitution expressed its policy with respect to the exaction of duty from Indians who "passed" and "repassed" the boundary between the United States and Canada carrying with them peltries and their personal belongings. Notwithstanding that the original as well as the several subsequent statutes enacted by the Congress contained similar language to that provided in article III of the Jay Treaty and were in conformity therewith, said statutes constituted and continued to constitute an independent declaration of legislative policy and intent. The subsequent amendments provided for in the Tariff Acts of 1890 and 1894, the express repeal of all prior acts relating to the duty exemption in question provided in the Tariff Act of 1897 and the enforcement of duty provisions thereafter by administrative officials lend validity to the interpretation that the Congress, pursuant to its constitutional duty and obligation, deemed that the passage of 100 years required a change in the tariff policy of this country. The specific inclusion of personal goods and belongings in subsequent tariff acts and tariff schedules of the United States likewise serves to corroborate the congressional intent to nullify the personal privilege which originally had been granted by article III of the Jay Treaty.

This court does not agree with the admonition of plaintiff's counsel that a concurrence in the reasoning of some of the appellate court decisions referred to herein would constitute a "perpetuation of an historical injustice." Nor can this court accept the premise, sometimes offered in order to reach a desired result, that the reasoning of earlier appellate decisions may have been eroded and become archaic through the passage of time.

Many wrongs may have been committed against the Indian people. The expiation of past injustices to a minority group of our citizens,

however, cannot be accomplished by a present refusal to adhere to the decisions of our appellate courts, which, independent of the rule of stare decisis, are deemed well reasoned and sound.

Indeed, the obligation of any strong and independent judiciary must be to zealously guard and protect the rights of minorities. But in so doing, reasoned objectivity in the exercise of judicial determination cannot be sacrificed.

It is the opinion of this court that the provisions of article III of the Jay Treaty of 1794 have been abrogated and are no longer in force and effect, nor constitute "the supreme law of the land" as they may relate to the plaintiff and the issues raised by him in his motion for summary judgment. Accordingly, the cross-motion of the defendant for summary judgment be and is hereby granted and the motion of the plaintiff for summary judgment is in all things denied.

Let judgment be entered accordingly.

(C.D. 4630)

RHODIA, INC. v. UNITED STATES

Memorandum Opinion and Order

Court Nos. 70/2988, etc.

Port of New York

[Plaintiff's motion for judgment on the pleadings denied; defendant's motion for summary judgment granted.]

(Dated January 30, 1976)

Sharretts, Paley, Carter & Blauvelt (*Steven R. Steven* and *Patrick D. Gill* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Herbert P. Larsen*, trial attorney), for the defendant.

WATSON, Judge: In the absence of any factual dispute, these cross-motions [1] raise again the issue decided in *Rhodia, Inc.* v. *United States*, 69 Cust. Ct. 19, C.D. 4366 (1972), in which it was held that an importation of a compound commonly called N-methyl glucamine was properly classifiable as a monomethyl monoamine [2] rather than as other nitrogenous compounds.[3]

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[1] Plaintiff moved for judgment on the pleadings and defendant cross-moved for summary judgment.
[2] Item 425.20 of the TSUS.
[3] Item 425.52 of the TSUS.

The information supplied in support of these motions has been more complete and well rounded than that presented in the prior case, proving, I suppose, that in areas of specialized knowledge the initial impression of being well informed can be illusory. As a result, I am now convinced that the conclusion reached in the first *Rhodia* case was erroneous. The doctrine of *stare decisis* is, of course, no basis for the perpetuation of an error which has been clearly and convincingly demonstrated. *United States* v. *Mercantil Distribuidora, S. A., et al.*, 45 CCPA 20, 23–24, C.A.D. 667 (1957).

Although the resolution of these motions has not been without its initial difficulties, the outcome of close study leaves no doubt in my mind as to the incorrectness of the first decision.

The affidavits submitted in support of defendant's motion establish with impressive authority precisely in which respects the prior decision was mistaken. Generally speaking, it was wrong to regard the language of item 425.20 as indicating the existence of a "class" of monoamines whose extent was limited only by the ingenuity of chemists in making substitutions apart from the single amine function. Similarly, it was wrong to speak of the importation at issue as a "form" of monoamine as if it were a variety of an *eo nomine* substance rather than another substance altogether.

The weight of the expert opinion now before the court is that in correct and accurate chemical terminology there is only one substance in the category monomethyl monoamine (which is methylamine, not the merchandise at bar) and the importation cannot be properly named as if it were a variety of monoamine. To do so would violate the prevailing rules of nomenclature by which chemists abide and result in errors and anomalies too numerous to detail here.

Contrary to what was thought in the original opinion, it now appears that the certainty and predictability of chemical tariff classification was not being fostered. Although I would certainly not rule out the possibility that chemicals may be classified under names which are popular or loose, the interests of certainty are probably best served by ordinarily utilizing the systematic terminology sanctioned by the acknowledged authoritative sources.[4]

As is pointed out by Dr. Loening, the classification of the importation as a monoamine is inconsistent with the nomenclature rules of both the *International Union of Pure and Applied Chemistry* and *Chemical Abstracts*.

Under these rules, the first step in arriving at a correct name for a compound is to determine the principal functional group. In this process hydroxyl groups outrank amino groups, or stated differently, hydroxyl groups are given a higher priority than amino groups for

[4] See generally, Tariff Classification Study, Schedule 4, page 2.

citation as the principal group in a compound. This leads to the naming of the importation as an alcohol and not as an amine since the priority of the hydroxyl groups is obvious in the structural formula depicted in the prior decision at page 20.

The remaining affidavits offered in support of defendant's motion are hardly less authoritative or incisive in analyzing the incorrectness of the prior decision and in discussing the correct chemical terminology. As a result, I am persuaded that the monoamines set out in item 425.20 can only be those compounds in which the amino group is not superseded by a function of higher priority as such functions are determined in accordance with the prevailing standards of chemical nomenclature.

The affidavits offered by plaintiff were not without their measure of authority or persuasion but in the balance they did not persuade me that the naming of the importation as a monoamine was correct.

For the reasons set out above and because it is undisputed that the importation is an organic nitrogenous compound, it is hereby

ORDERED, that plaintiff's motion for judgment on the pleadings be, and the same hereby is, denied, and it is further

ORDERED, that defendant's motion for summary judgment be, and the same hereby is, granted, and it is further

ORDERED, ADJUDGED and DECREED, that the classification of the merchandise at bar by the appropriate customs officer, under item 425.52 of the TSUS, as modified by T.D. 68–9, be, and the same hereby is, sustained, and it is further

ORDERED, ADJUDGED and DECREED, that all claims by plaintiff be, and the same hereby are, overruled and dismissed with prejudice.

(C.D. 4631)

M. L. DE LANGE *v.* UNITED STATES

Grain products

Merchandise consisting of grain, invoiced as "quick cooking barley" was classified as milled "barley: other," fit for human consumption, and assessed with duty at a rate of 2 cents per pound under item 131.12 of the tariff schedules. Plaintiff claimed the merchandise to be properly classifiable as pearl barley under item 131.10 of the schedules and, alternatively, as a cereal breakfast food or similar cereal preparation under item 182.30 of the schedules. HELD: Judgment for the defendant. Under the doctrine of *stare decisis*, the holding in a prior case involving the same merchandise and plaintiff-importer is dispositive of plaintiff's primary claim; the alternative claim is without merit for failure of plaintiff to discharge his burden of proof.

STARE DECISIS

The prior case of *M. L. de Lange* v. *United States*, 62 Cust. Ct. 17, C.D. 3665, 294 F. Supp. 646 (1969) explicitly decided plaintiff's contention that the standard for pearl barley is one which includes barley in various shapes and is not limited to barley having a ball shape. The record of the present case contains the same arguments made in the prior case in support of the claimed classification under item 131.10 of the schedules as pearl barley. Consequently, plaintiff failed to meet the requirement that clear and convincing evidence be shown to justify disregarding the authority and persuasiveness of the prior holding. See *United States* v. *Dodge & Olcott, Inc.*, 47 CCPA 100, 103, C.A.D. 737 (1960).

Court Nos. 69/7589, etc.

Port of New York

[Judgment for defendant.]

(Decided February 3, 1976)

M. L. de Lange pro se.
Rex E. Lee, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

RE, Judge: The question presented in this case pertains to the dutiable status, for tariff purposes, of certain merchandise imported by plaintiff from Holland in 1967 and 1968. The merchandise, consisting of grain, was invoiced as "quick cooking pearl barley." It was classified by the Customs Service under item 131.12 of the Tariff Schedules of the United States (TSUS) as milled "barley: other" fit for human consumption, and assessed with duty at 2 cents per pound.

Plaintiff challenges the classification and claims, alternatively, that the merchandise is properly classifiable either as "pearl barley" under item 131.10, TSUS, or as "cereal breakfast foods and similar cereal preparations" under item 182.30, TSUS. Under the claimed provisions, "pearl barley" carries a duty rate of 0.4 cents per pound, and "cereal breakfast foods and similar cereal preparations" are dutiable at a rate of either 4 or 5 percent ad valorem, depending upon the date of entry.

The pertinent tariff provisions read as follows:

Schedule 1, part 7, subpart B:

"Subpart B. – Milled Grain Products

Subpart B headnote:

1. The term "milled grain products," as used in this subpart, embraces flours, grits, groats, meal, flaked or rolled grains, and other products, all the foregoing, whether or not fit for human consumption, made or derived from the grains named in subpart

A of this part by grinding, crushing, breaking, rolling, flaking, pearling, polishing, or similar milling processes, but does not include by-products or wastes resulting from any of these processes.

	Milled grain products:	
	Fit for human consumption:	
	Barley:	
[Claimed] 131.10	Pearl barley	0.4¢ per lb.
[Classified] 131.12	Other	2¢ per lb."

Schedule 1, part 15, subpart B:

"Subpart B. – Edible Preparations

Subpart B headnotes:

1. This subpart covers preparations fit for human consumption not provided for elsewhere in schedule 1.

* * * * * * *

[Claimed] 182.30	Cereal breakfast foods and similar cereal preparations, by whatever name known, processed further than milling	5% ad val. [or] 4% ad val. [T.D. 68–9]"

The merchandise in the present case has been the subject of prior customs litigation by the same plaintiff-importer. See *M. L. de Lange* v. *United States*, 62 Cust. Ct. 17, C.D. 3665, 294 F. Supp. 646 (1969) decided by Judge Richardson. In that case, identical or almost identical merchandise was classified, as in the present case, under item 131.12 of the tariff schedules. Plaintiff claimed it was dutiable as pearl barley under item 131.10 of the tariff schedules (having failed properly to file his alternative claim for classification under item 182.30 of the tariff schedules as a cereal preparation).

It was plaintiff's contention that the merchandise was pearl barley which, after pearling, was subjected to additional processing involving rolling or pressing in order to shorten the cooking time. The imported grains, which plaintiff conceded were not in pellet form, were flat and circular in shape—the result, he claimed, of the additional rolling or pressing operation.

Plaintiff maintained that the merchandise was pearl barley for tariff purposes regardless of the additional processing, shape, or size of the grain. He claimed that, whereas "pearl barley" was formerly recognized as having a ball or pellet shape, the term now applies to "broken pieces" and other shapes. On the ground that plaintiff had

failed to overcome the presumption of correctness that attached to the classification of the customs officials, the defendant offered no evidence.

In rejecting plaintiff's claim, the court cited various lexicographic authorities and the *Summary of Tariff Information, 1929* (a Tariff Commission publication prepared for congressional use on the bill subsequently enacted as the Tariff Act of 1930) all of which defined pearl barley as barley ground into small round grains or pellets. The court stated:

> "From the foregoing definitions of pearl barley it is clear that a particular form of the barley kernel or grain, namely, round or ball shaped, is the quintessence of the nomenclature identifying the article from the standpoint of common usage of the term prior to the enactment of the Tariff Schedules of the United States in 1963. And nothing in the explanatory notes to the Tariff Classification Studies of 1960 pertaining to item 131.10 of the then proposed tariff schedules suggests any congressional intent to deviate from the common meaning of the term 'pearl barley' under prior tariff provisions therefor. * * *" 62 Cust. Ct. at 19.

Referring to the long-standing principle of customs law that the common meaning of a tariff term is presumed to be the same as its commercial meaning, unless the contrary is shown, the court noted that plaintiff offered no evidence to establish a commercial designation for the merchandise consistent with his claimed classification. Accordingly, the government's classification of the merchandise was sustained on the ground that there was a total failure of proof to support plaintiff's claim.

In the case at bar, plaintiff submits the same arguments made in the prior case in support of his claim for classification under item 131.10 of the tariff schedules. In his brief he asserts that the "existing" standard for pearl barley is one which includes barley in various shapes, replacing the "antiquated" standard which limited that term to barley having a ball shape. This contention was considered and explicitly decided in the prior *de Lange* case. After studying the record in this case and the incorporated record of the prior case, the court is not persuaded that the holding in the prior case, with respect to the common meaning of "pearl barley," is in error. The court agrees with the findings made in the prior case that the merchandise, in its imported form and condition, was not commonly known as "pearl barley," and that to come within the common understanding of that term, a small ball or pellet shape is a *sine qua non* of the article. Indeed, the 1966 edition of *Webster's Third New International Dictionary of the English Language, Unabridged*, defines pearl barley as "barley ground into small round pellets."

Plaintiff relies upon the following statement in the *Summaries of Trade and Tariff Information*, 1966, Schedule 1, Volume 6, page 93:

> "Pearl barley is made by placing large-kerneled, whole grain in a revolving perforated cylinder with abrasive disks. During the process of pearling, the hull and the bran are removed, and the whole grain is reduced to small round pellets known as white pearl barley. Pellets with some of the bran intact are known as brown pearl barley or pot barley. The further milling of white pearl barley reduces the product to flour."

It is to be noted that the quoted comment was written *after* the adoption of the TSUS in 1963, and thus cannot be considered as revealing the congressional intent at the time of the enactment of the tariff schedules. Furthermore, the statement does not indicate a change in the understanding, common or commercial, of the term in issue.

It is incumbent upon plaintiff to establish a commercial designation for the designation "pearl barley" which comports with his claim. This requires affirmative proof that there existed in the trade and commerce of the United States, at and prior to the enactment of the tariff term under construction, a commercial meaning different from its common meaning which is uniform, definite and general throughout the United States. *C. J. Tower & Sons* v. *United States*, 47 CCPA 85, C.A.D. 734 (1960); *United States* v. *M. & D. Miller, Inc.*, 41 CCPA 226, C.A.D. 556 (1954); *Jas. Akeroyd & Co. et al.* v. *United States*, 15 Ct. Cust. Appls. 440, T.D. 42641 (1928); *John A. Steer Company* v. *United States*, 41 Cust. Ct. 156, C.D. 2034 (1958).

In the present case the plaintiff again has failed to establish a commercial meaning different from the common meaning for pearl barley. The record is almost entirely limited to plaintiff's experience with the merchandise at bar. That experience consisted of importing and selling between five and fifteen shipments during the period 1949 through 1969, and what he considered to be the competitive product of domestic manufacturers. This record falls far short of establishing, by competent evidence, that the merchandise at bar is generally, uniformly and definitely recognized throughout the trade in this country as pearl barley.

In support of his argument that pearl barley need not be round or ball shaped, plaintiff cites certain federal specifications for pearl barley which were issued by the Commissioner, Federal Supply Service, General Services Administration. In addition to the fact that the sizes specified for sieve preparations, upon which plaintiff relies, do not establish anything pertinent to the issue presented, it is well settled that the definitions and regulations of other government agencies do not bind this court in its determination of the meaning of words under tariff laws. *United States* v. *Mercantil Distribuidora, S.A., et al.*, 43 CCPA 111, C.A.D. 617 (1956); *Swift & Co.* v. *United*

States, 27 CCPA 181, C.A.D. 83 (1939); *Julius Goldfarb* v. *United States*, 64 Cust. Ct. 40, C.D. 3956 (1970).

In the present action, plaintiff has not presented clear and convincing evidence of error which would justify this court in disregarding the persuasiveness and authority of the holding in *M. L. de Lange* v. *United States*, 62 Cust. Ct. 17, C.D. 3665, 294 F. Supp. 646 (1969). As aptly stated by the Court of Customs and Patent Appeals: "This requirement is not satisfied by a reargument of the former issues on the same or a merely cumulative record." *United States* v. *Dodge & Olcott, Inc.*, 47 CCPA 100, 103, C.A.D. 737 (1960). By the doctrine of *stare decisis*, the holding in the prior *de Lange* case, therefore, is dispositive of plaintiff's first claim in the present case. See also *Nishimoto Trading Company, Ltd., Arthur J. Fritz Company* v. *United States*, 72 Cust. Ct. 53, C.D. 4504 (1974), *aff'd*, 62 CCPA 34, C.A.D. 1140, 508 F. 2d 1340 (1975); *Julius Goldfarb* v. *United States*, 64 Cust. Ct. 40, C.D. 3956 (1970); *Manca, Inc.* v. *United States*, 47 CCPA 103, C.A.D. 738 (1960). Consequently, it is the determination of the court that plaintiff's first claim must fall.

Plaintiff's alternative claim is for classification of the merchandise under item 182.30 of the tariff schedules as a cereal breakfast food or similar cereal preparation. The court notes that the governing headnote, and the tariff provision itself, limit their coverage to foods and preparations which are (1) not provided for elsewhere in schedule 1, and (2) processed further than milling.

The presumption of correctness attaching to the classification of the customs officials has been codified in 28 U.S.C. § 2635(a) which states that "[t]he burden to prove otherwise shall rest upon the party challenging a decision." It is clear, therefore, that plaintiff has the burden of proving that the imported merchandise meets the requirements under item 182.30 of the tariff schedules. The record, however, contains no evidence as to how the subject merchandise was manufactured or processed. Moreover, plaintiff concedes that he has never seen the merchandise produced. Since plaintiff has failed to establish the primary requirement for the claimed alternative classification, this claim, also must be rejected. It is unnecessary, therefore, to consider whether plaintiff has established, as he must, that the imported barley product is a cereal breakfast food or similar cereal preparation.

Plaintiff relies upon a customs laboratory report, apparently prepared in connection with the merchandise in the incorporated case, to support his contention that the present shipment of barley was processed further than milling. This report, No. D 23542 of November 18, 1965, incorporated with the record of the prior case, states that "[t]he sample is processed pearl barley—rolled or pressed."

Plaintiff's reliance is misplaced. Clearly, that statement does not

address itself to the method of manufacture or the manner in which the rolling or pressing was accomplished. Furthermore, the court does not agree with plaintiff that the term "processed," as used therein, necessarily connotes a product processed further than milling. Finally, it is also to be noted that headnote 1 of schedule 1, part 7, subpart B, which governs items 131.10 and 131.12, states that the term "milled grain products," as used in that subpart, embraces, among others, "*rolled* grains * * * made or derived from the grains named in subpart A * * * by * * * rolling * * * or similar processes [emphasis added]." The court is not convinced that the rolling or pressing to which the merchandise may have been subjected, as suggested by the laboratory report, was not a "milling process" within the ambit of the headnote.* Of course, the report's observation that the sample was "processed pearl barley" also cannot be relied upon in support of plaintiff's first claim since admittedly the barley was flat in shape, and therefore lacking the prerequisite ball or pellet shape to be recognized as "pearl" barley.

In view of the present failure of proof, and the prior holding of this court in *M. L. de Lange* v. *United States*, 62 Cust. Ct. 17, C.D. 3665, 294 F. Supp. 646 (1969), both claims are dismissed.

Judgment will be entered accordingly.

(C.D. 4632)

CONCORD ELECTRONICS CORP. *v.* UNITED STATES

On Defendant's Motion for Summary Judgment

Court No. 72-7-01546

Port of Los Angeles

[Judgment for defendant.]

(Decided February 4, 1976)

Serko & Simon (*Joel K. Simon* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Max F. Schutzman*, trial attorney), for the defendant.

FORD, Judge: This matter is before the court by virtue of a motion for summary judgment made by defendant pursuant to the provisions

*The *Summaries of Trade and Tariff Information*, 1966, *supra* at page 105, describe the milled oat products dutiable under items 131.25 and 131.27, TSUS, which also are governed by the headnote defining "milled grain products." Among the articles listed therein are oats which, after being hulled, are "steamed and rolled into thin flakes called rolled oats * * *." This process is very similar to the one plaintiff claims was performed on the merchandise at bar. Thus it may be observed that the Tariff Commission (now the International Trade Commission), which prepared the *Summaries*, considers rolling accompanied by steaming to be a milling process within the ambit of the headnote.

of rule 8.2 of the rules of this court, wherein the defendant seeks dismissal of the action. In support thereof defendant contends there is no genuine issue of fact inasmuch as a prior judgment of this court, *Concord Electronics Corp.* v. *United States*, 69 Cust. Ct. 241, A.R.D. 304, 345 F. Supp. 1000 (1972), *appeal dismissed*, 60 CCPA 185 (1972), involving the same merchandise and same plaintiff is a bar to the action on the ground of collateral estoppel.

Plaintiff in addition to devoting much of its memorandum in opposition to the applicability of collateral estoppel states as follows:

> It should be noted that we believe there now is available to plaintiff evidence which should be sufficient to overcome this presumption of correctness. This evidence was not available to plaintiff at the time of the original *Concord*, *supra*, case. This intervening change in the facts available to plaintiff in the pursuit of this matter makes litigation of this action necessary. * * * [Plaintiff's memorandum, page 3.]

Whether or not collateral estoppel is applicable in this case need not be considered in view of the language of rule 8.2(f) of the rules of this court which reads as follows:

> (f) Form of Affidavits; Further Testimony: Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein. Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith, except that all papers and documents which are part of the official record of the action may be referred to in an affidavit without attaching copies, and shall be considered by the court without additional certification. The court may permit affidavits to be supplemented or opposed by depositions or by further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, will be entered against him.

From the foregoing, it is apparent plaintiff has failed to comply with the requirements of the above rule in that there were no specific facts set forth showing a genuine issue for trial. Plaintiff's attorneys allege they "believe" there is now available evidence not available at the time of the original trial which "should" be sufficient to overcome the presumption of correctness. What type of evidence or what it relates to is not disclosed. Whether the parties will proceed on the separability theory in view of the decision in the prior *Concord* case, *supra*, or establish value in accordance with the statutory provisions

is likewise not revealed. The court is of the opinion that rule 8.2(f) requires more than a vague and ambiguous statement relating to new evidence.

In addition it is to be noted that issue was joined on September 30, 1974. Accordingly, more than one year having elapsed since joinder under rule 8.3(b)(2)[1] or rule 8.3(b)(4),[2] the court *sua sponte* may dismiss the action for failure to prosecute. *Englishtown Corp.* v. *United States*, 73 Cust. Ct. 240, C.R.D. 74–12 (1974).

Accordingly, defendant's motion for summary judgment to dismiss the matter is granted. Judgment will be entered accordingly.

(C.D. 4633)

ALCAN SALES, DIV. OF ALCAN ALUMINUM CORPORATION *v.* UNITED STATES

On Defendant's Motion for Summary Judgment

Court No. 72-9-01963

Port of Duluth

[Motion granted.]

(Dated February 5, 1976)

Barnes, Richardson & Colburn (David O. Elliott of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Andrew P. Vance*, Chief, Customs Section), for the defendant.

Before BOE, Chief Judge, MALETZ and RE, Judges

JUDGMENT ORDER

Upon reading and filing defendant's motion for summary judgment accompanied by a statement of material facts, plaintiff's response to defendant's motion for summary judgment, plaintiff's statement pursuant to rule 8.2(b), the record in *United States* v. *Yoshida International, Inc.*, 63 CCPA 41, C.A.D. 1160 (1975), incorporated herein, and upon all other papers and proceedings had herein, it is hereby

ORDERED, ADJUDGED and DECREED that in view of the decision of the United States Court of Customs and Patent Appeals, 63 CCPA 41,

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[1] "(2) An action in which issue has been joined, but no further proceedings have been instituted for a period of 1 year, may be dismissed by the court on its own motion for lack of prosecution unless good cause is shown for such delay."

[2] "(4) Whenever it shall appear that an action is not being prosecuted with due diligence, the court may, either upon its own motion or upon motion of the defendant, order the action dismissed for lack of prosecution."

C.A.D. 1160 (1975), which reversed the decision of this court in *Yoshida International, Inc.* v. *The United States*, 73 Cust. Ct. 1, C.D. 4550, 378 F. Supp. 1155 (1974), defendant's motion for summary judgment be, and the same hereby is granted, and the assessment of the supplemental duty of 10% ad valorem under item 948.00, Appendix to the Tariff Schedules of the United States, is hereby sustained.

(C.D. 4634)

NORMAN G. JENSEN, INC. *v.* UNITED STATES

Transportation equipment—Tractors

Certain four-wheeled tractors, models C5D and C6D, denominated "Tree Farmers" by the manufacturer, the primary use of which is for skidding logs, were classified as "other" tractors under item 692.35 TSUS, as modified by T.D. 68–9, and assessed with duty at 5.5 per centum ad valorem. Plaintiff claims said tractors are entitled to free entry under item 692.30 TSUS as tractors suitable for agricultural use. HELD: Claim for free entry is sustained.

The science of silviculture relates to the growing of trees. It is based on a knowledge of silvics.

As the court perceives the issue, it matters not who uses the "Tree Farmer," that is, whether the trees are harvested by commercial loggers, farmers or itinerant laborers. Nor does it matter whether the end product is utilized for fuel, fencing, lumber, woodpulp, etc. The harvesting of a timber crop is an agricultural pursuit.

Court No. 73–7–02041

Port of Grand Portage (Duluth)

[Judgment for plaintiff.]

(Decided Feburary 12, 1976)

Barnes, Richardson & Colburn (*Joseph Schwartz* and *James S. O'Kelly* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Andrew P. Vance, Steven P. Florsheim*, and *Wesley K. Caine*, trial attorneys), for the defendant.

FORD, Judge: Certain four-wheeled tractors, models C5D and C6D, denominated "Tree Farmers" by the manufacturer were classified under item 692.35 TSUS, as modified by T.D. 68–9, as "other" tractors and assessed with duty at 5.5 per centum ad valorem. Plaintiff contends said tractors are entitled to entry free of duty under provision of item 692.30 TSUS as tractors suitable for agricultural use.

The parties agree upon the actual and predominant use of the involved tractors. For all practical and commercial purposes they are used to "skid" logs and are accordingly suitable for such use. The question presented by plaintiff is whether forestry is an agricultural pursuit within the meaning of item 692.30, *supra*. Defendant contends the issue is whether logging is an agricultural pursuit within item 692.30, *supra*.

The pertinent statutory provisions read as follows:

	Tractors (except tractors in item 692.40 and except automobile truck tractors), whether or not equipped with power take-offs, winches, or pulleys, and parts of such tractors:	
692.30	Tractors suitable for agricultural use, and parts thereof	Free
692.35	Other	5.5% ad val.

The record consists of the testimony of fourteen (14) witnesses, seven (7) called on behalf of each party, and the receipt in evidence of nine (9) exhibits for plaintiff and eight (8) for defendant.

The background and experience of the witnesses called on behalf of plaintiff are as follows:

Mr. Raymond Charles Glavish, Thunder Bay, Ontario, Canada, has been employed by the Canadian Car Division, Hawker Siddeley Canada, Ltd. for 11 years. He has had various management and marketing positions, including general manager of Can-Car, Inc. from 1963 to 1973. He has acquired familiarity with Tree Farmers through sale and distribution and actually observing the tractors in use "in most every state" where timber is harvested.

Mr. Harold Morgan Murphy, Montgomery, Alabama, is president of Leary & Owens Equipment Company. He has purchased Tree Farmer log skidders from Can-Car, Inc. (including those in entries 101150 and 101146) and has sold them in Alabama and Florida.

Mr. Horace W. Johnson, Isle of Palms, South Carolina, is a forestry equipment dealer in Moncks Corner, South Carolina. He has purchased Tree Farmers from Can-Car, Inc. for five years.

Mr. Clyde Alvin Dyson, Springfield, Georgia, has been a logging contractor for seven years. He has used a Tree Farmer for two years.

Mr. Ronda Wayne Dunn, Alexandria, Louisiana, is district sales manager for Can-Car, Inc., Atlanta, Georgia. He calls on dealers west of the Mississippi River. He has been with Can-Car, Inc. for four and one-half years and is a graduate of Auburn University, Department of Forestry under the School of Agriculture.

Mr. Walter Furgat, Brattleboro, Vermont, is president of Furgat Tractor & Equipment, Inc. He has sold and serviced farm and forestry

equipment for 22 years. He has been a dealer for Can-Car, Inc. in Vermont, New Hampshire, Massachusetts and Connecticut for eight years and has viewed Tree Farmers in use.

Mr. Harry E. Fisher, Grand Marais, Minnesota, is president of North Shore Forest Products, Inc., a logging concern. He has been involved in general administrative and operational supervision for nine and one-half years. He is a graduate of the University of Minnesota School of Forestry. His company owns and uses four Tree Farmer skidders. He has also observed their use throughout northern Minnesota.

A brief description of the background of witnesses called on behalf of defendant is as follows:

Mr. Samuel T. Hudson, Jr., Fairfax, Vermont, has been a county forester with the Department of Forests and Parks, State of Vermont for 16 years. He holds a B.S. degree in forest management from North Carolina State University. He has seen log skidders at work four to six times per month since 1962.

Mr. Harry Gene Gibson, Morgantown, West Virginia, is a research mechanical engineer, project leader with the Forest Service, United States Department of Agriculture. He holds a B.S. degree in mechanical engineering and an M.S. in forest engineering from West Virginia University. He has seen the Tree Farmer in operation and has done some research on four-wheeled skidders.

Dr. John H. Ohman is director of the North Central Forest Experiment Station, U.S.D.A., Forest Service, St. Paul, Minnesota. He holds a B.S. in forest management and a Ph. D. in forest pathology from the University of Minnesota. He does research in all phases of forestry and has worked for the Forest Service approximately 12 years. He has observed log skidders in operation.

Mr. William C. Gooder, Wausau, Wisconsin, has been regional representative for the International Woodworkers of America (a labor union) for three years. He represents some log skidder operators and has seen them at work but he has never worked in a forest nor run a skidder for his livelihood.

Mr. Stanley R. Olsen, Ely, Minnesota, has been a logger for 24 years. He has owned and operated a four-wheeled skidder for two years.

Mr. Ferdinand H. Thums, Isabella, Minnesota, has been a logger for 10 years and has owned two four-wheeled skidders for 6 years.

Mr. Jack Benns, Chicago, Illinois, is president of three subsidiaries of Pettibone Corp., a forest equipment manufacturer. He supervises manufacturing, engineering and marketing of forest equipment. He has been with the company for 30 years.

The record establishes the imported tractors are predominantly used to skid logs in the harvesting of trees. There is some testimony

indicating additional uses with attachments to cut down trees. for site preparation, fertilization, hauling wagons, etc. Illustrative exhibits 1 and 2 depict the imported tractors. The construction and design of the involved tractors make them particularly suitable for skidding logs. These features include four large wheels instead of two, four-wheel drive, articulated design (hinged in the center), weight distribution, logging arch winch and high ground clearance. The tractors are thereby provided with greater maneuverability and utility when operating among trees. The Tree Farmers are sold to tree harvesters, logging contractors, pulpwood companies, woodsmen, farmers and individuals.

Skidding entails the removal of a severed tree trunk from the area in which it was growing to a more suitable place for transportation known as the landing area. According to witnesses Glavish, Dunn, Furgat and Fisher, the fallen tree would have no economic value without the skidding process. In addition, without removal of the tree, it would impede the planting of another crop of trees. The harvesting of trees in the opinion of witnesses Glavish, Johnson, Dunn, Hudson, Fisher and Ohman includes the process of moving a crop of timber. This process terminates when the logs reach the landing area.

The use of the involved tractors for skidding logs from the growing area to the landing area is borne out by the record. The basic disagreement among the witnesses is whether this constitutes an agricultural pursuit or a logging operation. Plaintiff's witnesses Glavish, Johnson, Dyson, Dunn and Fisher consider the planting, cultivating and harvesting of trees an agricultural pursuit. Defendant's witnesses, on the other hand, consider it as logging which is a function of the lumbering industry. According to witnesses Ohman and Benns lumbering is an industry separate and apart from agriculture. The witness Gooder testified that the labor union representing loggers includes lumbermen and sawmill workers but does not represent agricultural workers. Defendant further contends that since forests do not produce an annual crop and are a renewable natural resource as distinguished from a crop which is planted annually, they do not fall within the understanding of the term agriculture.

The science of silviculture relates to the growing of trees. The definition of this term as contained in *Terminology of Forest Science, Technology, Practice & Products* (Society of American Foresters, Washington, D.C., 1971) is illuminating and reads as follows:

> SILVICULTURE (s.c.)
> (1) Generally, the science and art of cultivating (i.e. growing and tending) forest crops, based on a knowledge of silvics
> (2) More particularly, the theory and practice of controlling the establishment, composition, constitution and growth of forests. [Pp. 240–241.]

The court is aware and may take judicial notice that all forest areas are not maintained for the purpose of timber. The federal government recognizes this in providing the National Forest Wilderness System the objectives of which are set forth in 36 C.F.R. 293.2 and read insofar as is pertinent as follows:

> * * * In carrying out such purposes, National Forest Wilderness resources shall be managed to promote, perpetuate, and, where necessary, restore the wilderness character of the land and its specific values of solitude, physical and mental challenge, scientific study, inspiration, and primitive recreation. To that end:
>
> (a) Natural ecological succession will be allowed to operate freely to the extent feasible.
>
> (b) Wilderness will be made available for human use to the optimum extent consistent with the maintenance of primitive conditions.
>
> (c) In resolving conflicts in resource use, wilderness values will be dominant to the extent not limited by the Wilderness Act, subsequent establishing legislation, or the regulations in this part.

In addition to the foregoing, Congress by means of H.R. 4728, 75th Congress, 1st Session (May 18, 1937), enacted the Cooperative Farm Forestry Act, which reads as follows:

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled*, That in order to aid agriculture, increase farm-forest income, conserve water resources, increase employment, and in other ways advance the general welfare and improve living conditions on farms through reforestation and afforestation in the various States and Territories, the Secretary of Agriculture is authorized in cooperation with the land-grant colleges and universities and State forestry agencies, each within its respective field of activities, according to the statutes, if any, of the respective States, wherever such agencies can and will cooperate, or in default of such cooperation to act directly, to produce or procure and distribute forest trees and shrub planting stock; to make necessary investigations; to advise farmers regarding the establishment, protection, and management of farm forests and forest and shrub plantations and the harvesting, utilization, and marketing of the products thereof; and to enter into cooperative agreements for the establishment, protection, and care of farm- or other forest-land tree and shrub plantings within such States and Territories; and, whenever suitable Government-owned lands are not available, to lease, purchase, or accept donations of land and develop nursery sites for the production of such forest planting stock as is needed to effectuate the purposes of this Act, but not including ornamental or other stock for landscape plantings commonly grown by established commercial nurserymen, and no stock grown in Government and cooperating nurseries shall be allowed to enter regular trade channels. No cooperative reforestation or afforestation shall be undertaken pursuant to this Act unless the cooperator makes

available without charge the land to be planted. There is hereby authorized to be appropriated annually not to exceed $2,500,000 for carrying out the purposes of this Act. This Act shall be known as the Cooperative Farm Forestry Act.

Approved May 18, 1937. [50 Stat. 188.]

Congress in the appropriation for the Forest Service on June 4, 1936 under the heading "Forest influences" stated as follows:

> Forest influences: For investigations at forest experiment stations and elsewhere for determining the possibility of increasing the absorption of rainfall by the soil, and for devising means to be employed in the preservation of soil, the prevention or control of destructive erosion, and the conservation of rainfall on forest or range lands, $269,152: *Provided*, That $170,000 of this appropriation shall be available only for maintenance in nurseries of existing stocks and for the free distribution thereof to farmers, in liquidation of the so-called shelter belt project of trees or shrubs in the plains region undertaken heretofore pursuant to appropriations made for emergency purposes. [49 Stat. 1438–39.]

With respect to the shelter belt project referred to *supra*, the following information contained in the *Forestry Handbook* (Ronald Press, 1955) sets forth its benefits as follows:

> SHELTERBELTS AND WINDBREAKS. Beneficial Influences. The beneficial influences of windbreaks and shelterbelts have been well established by land users in the United States and many foreign countries. Such plantings diminish by as much as 20 to 30 percent the amount of fuel that is needed to heat a home. Livestock winter better on less feed and with greater weight gains in the protection of windbreaks and shelterbelts. Properly designed shelterbelts protect cultivated fields from wind erosion and give growing crops considerable protection from wind damage. The saving of one season's crops sometimes compensates for the entire cost of the planting. The average gain in crop yields will more than compensate for the area occupied by shelterbelts. The greatest returns have been realized from plantings established for the protection of orchards. The increase in grade of some fruits frequently runs as much as 25 to 50 percent. The accumulation of water in the form of snow within, and to the leeward of, the shelterbelts is an important factor in building up the ground water supply and providing moisture for growing crops.
>
> The cumulative effect of shelterbelts systematically placed over large acreages has not been thoroughly studied. Such information as we have indicates that the cumulative effect is of considerable importance and should have a place in long-range community planning. [Sec. 6, pp. 63–64.]

From the foregoing it is apparent the growth and production of trees for other than timber use are numerous.

There is of course the growth of trees for timber purposes. *The Book of the States*, Vol. XX (Council of State Governments, Lexington, Ky., 1974–1975), sets forth the following:

> More than 70 percent of the Nation's commercial forest land is owned by private citizens and 60 percent is in farms and other nonindustrial holdings involving over 4 million landowners. These are the so-called "small owners" (i.e., less than 500 acres) who own the most productive forest land. Technical forestry assistance is available to these owners through the state forestry organizations on an advisory and educational basis. The state foresters, in many cases, advise owners of larger areas to secure the services of a private consultant. The federal government, through the U.S. Forest Service, provides financial and other assistance to the state foresters in carrying out this program. Assistance and advice to private landowners covers tree planting, timberstand improvement, improved harvesting, marketing assistance, and formation of management plans to help meet the owner's objectives. One of the major problems in establishing good forest practices on small private woodlands in some areas of the Nation is lack of adequate markets for local species and small-sized trees. However, on August 10, 1973, the President signed the Agriculture Bill of 1973. Title X of the act includes a Forestry Incentives Program designed to encourage the small private landowner to plant and manage his woodland primarily for timber production. Cost-sharing programs will be developed by the U.S. Forest Service and the State foresters. * * * [P. 488.]

John Frederick Preston authored a book entitled *Farm Wood Crops* (McGraw-Hill, 1st ed., 1949). In chapter 5 entitled "Problems of Forestry on the Farm," the author makes an astute observation:

> Farm forestry is not a forestry job on farmland; it is a farm job on forest land. There is a great difference between these two concepts and in the resulting approach to the problem. The starting point in farm forestry is not really forestry at all—it is farm planning. The farm must be analyzed to find out just what place in farm economy the woodland can fill. It is not sufficient to help the farmer sell his ripe timber and to show him how to mark the trees. The farmer must make a momentous decision, namely, that certain specified farmland, over the years, will contribute most to the business of farming if devoted to the growing of forest crops. [P. 58.]

As stated *supra*, it is the position of defendant that since trees are not produced on an annual basis they do not fall within the term agriculture. The court's view is to the contrary.

According to witness Johnson pine trees in the Southern States are harvested 10–15 years after planting. It is noteworthy that not all agricultural crops have annual crops. Newly planted fruit trees do not bear fruit on an annual basis as indicated in the U.S. Department

of Agriculture, Leaflet No. 172, entitled "Why Fruit Trees Fail to Bear," which sets forth the following dates of maturity:

The age (from planting) when trees can be expected to bear fruit are as follows:

Variety	Time in Years
Apple	2 to 5
Apricot	2 to 5
Cherry, sour	3 to 5
Cherry, sweet	4 to 7
Citrus	3 to 5
Fig	2 to 3
Peach	2 to 4
Pear	4 to 6
Plum	3 to 6
Quince	5 to 6

That the annual harvesting of trees is a desired method is indicated in *Harvesting Timber Crops* by Wackerman, Hagenstein and Michell (McGraw-Hill, 2d ed., 1966), wherein the following statement is made:

> * * * All agricultural operations, for example, are directed toward the development of timber stands as rapidly as is consistent with the quality of wood desired. Thinning, pruning, cleaning, and other cultural operations are designed to hasten the growth and development of and to improve the quality of marketable crops of trees; thus harvesting the crop is an achievement resulting from, or made possible by, past forestry efforts.
>
> Harvesting time in the forest, as on the farm, is the time of cash income. It is payday in the woods. Continual harvesting operations day-by-day and year-by-year are much more desirable in the forestry business than infrequent or intermittent harvesting. Hence, most forests are managed for an even harvest flow year-by-year. [P. 7.]

The utilization by the defendant of the *Standard Industrial Classification Manual** for the purpose of indicating that logging is not within the scope of agriculture is not determinative. It is noted that "Forestry" is in the same division—A—as agriculture although in a different group. The growing of trees (forestry) for timber purposes can only come to that position if the crops (trees) are harvested and sent to market.

Without the skidding process, the fallen stem would have no economic or residual value. As the court perceives the issue it matters not who uses the Tree Farmer, that is, whether the trees are harvested by commercial loggers, farmers, or itinerant laborers. Nor does it

* This work was cited in the *Tariff Classification Study Submitting Report* for TSUS as having a great influence on the arrangement of the new classification system.

matter whether the end product is utilized for fuel, fencing, lumber, woodpulp, etc. The harvesting of a timber crop is an agricultural pursuit and remains so until, as stated by witnesses indicated, *supra*, it leaves the forest.

It is a matter of common knowledge, with which this member of the court is personally familiar, that there are those engaged in custom combining of small grain on a commercial basis. This includes both straight combining or swathing after which the grain is allowed to dry 2–4 days before combining with the use of a windrow pick-up. The custom combiners begin their journey in the grain fields of the Southern States during the early days of summer and continue north toward the Canadian border with their combining equipment. In addition many farmers having this equipment do combining for farm neighbors in local areas. The court could not conceive that defendant would seriously contend such custom combining of grain is not agricultural unless performed by the farmer with his own equipment on his own farm. By the same token the harvesting of trees by loggers does not make such action any less an agricultural pursuit.

Hence while logging as a commercial pursuit may be classified by the *Standard Industrial Classification Manual* separately, the harvesting of a timber crop either by a farmer or commercially constitutes, in the court's opinion, the harvesting of a crop. It is also to be noted as indicated, *supra*, that more than 70 percent of forest land is owned by private citizens and that 60 percent is in farm and other nonindustrial holdings. Accordingly the harvesting of trees is an agricultural pursuit in the same manner as the planting bullets utilized to plant trees were held to be argicultural implements. *Border Brokerage Company, Inc.* v. *United States*, 65 Cust. Ct. 277, C.D. 4089, 343 F. Supp. 1396 (1970), *aff'd* 59 CCPA 151, C.A.D. 1058, 461 F. 2d 1383 (1972).

Defendant argues further that the involved tractors are merely handling equipment and not tractors suitable for agricultural use. Since the pleadings make no claim under any provision for handling equipment this issue is not before the court for determination.

In any event since silviculture and the harvesting of the crop are agricultural pursuits, the skidding of logs to prepare them for market falls within the same category as the fruit boxes involved in *C. J. Tower & Sons* v. *United States*, 32 Cust. Ct. 54, C.D. 1579 (1954) and the farm cotton wagons in *Richard L. Jones* v. *United States*, 58 Cust. Ct. 165, C.D. 2920, 265 F. Supp. 945 (1967).

In view of the foregoing, the court finds the tractors involved to be suitable for agricultural purposes. The claim of plaintiff is, therefore, sustained. Judgment will be entered accordingly.

(C.D. 4635)

F. W. Myers & Co., Inc. *v.* United States

Iron powder
(Atomet 28)

Sponge Iron Powder—Porosity—Mixed Particles

Iron powder, described as Atomet 28, was classified in liquidation upon entry at Detroit, Michigan, from Canada as "other powders" under TSUS item 608.05, at the duty rate of 0.3 cents per pound, and it is claimed by the importer that the imported powder should be classified as sponge iron powder under TSUS item 608.02 at the duty rate of 37 cents or 25 cents per ton, depending on the date of entry.

Evidence in a voluminous record compiled after trial discloses that U.S. Customs Laboratories at Chicago and Boston analyzed Atomet 28 samples and reported them to be sponge iron powder, that when Atomet 28 was first imported into the United States it was classified as sponge iron powder but that this classification was changed following the institution of a manufacturer's protest by a domestic competitor which culminated in a Customs Service ruling apparently relied upon in the classification of the imported powder, that the imported powder is produced in Canada in a manner similar to a process reported by the Tariff Commission as being recognized in the industry as a sponge iron process, and the micrographic examination of the imported powder reveals a mixture of particles with high density and low microporosity and particles with low density and high microporisity comparable to characteristics of the Mannesmann [Naeser] process which is described by a leading authority in the field of powder metallurgy, namely, Dr. W. D. Jones, as a sponge iron process.

Held, the evidence establishes that the imported merchandise is a porous iron powder which should be classified as sponge iron powder as recommended by government chemists. Furthermore, classification of the imported merchandise cannot properly be influenced by the government's reference to a "mixed powder" composition of the merchandise inasmuch as this reference is based upon an erroneous interpretation of Dr. Jones' "mixed particles" observation of characteristics exhibited by a sponge iron powder.

Court No. 72-3-00710

Port of Detroit

[Judgment for plaintiff.]

(Decided February 13, 1976)

Covington & Burling (*Donald Hiss* and *Rodney E. Gould* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis*, trial attorney), for the defendant.

Richardson, Judge: The merchandise in this case, described on the invoices as Atomet 28 Iron Powder, was classified in liquidation

upon entry at the port of Detroit, Michigan, under TSUS item 608.05 at the duty rate of 0.3 cents per pound as other powders other than alloy iron or steel. It is claimed in this action that the merchandise should be classified under TSUS item 608.02 as modified in T.D. 68–9 at the duty rate of 37 cents or 25 cents per ton, depending upon date of entry, as sponge iron powder.

The competing tariff provisions read:

[Classified]

Other powders:
Other than alloy iron or steel

[Claimed]

Sponge iron; iron or steel powders:
Sponge iron, including powders thereof:
Not containing chromium, molybdenum, tungsten, or vanadium in amounts specified in headnote 4 of this subpart

The record in the case is voluminous, covering some 925 pages of trial testimony given by eight witnesses, and includes extensive documentary exhibits and various samples of iron powders, compounds and other forms of iron and iron products, as well as the official papers. The merchandise at bar is covered by some 24 entries which were made by plaintiff as agent for Quebec Metal Powders Limited of Sorel, Canada, the manufacturer.

According to the official papers (placed in evidence by the government) a sample of the imported merchandise, Atomet 28, was subjected to analysis by government chemists at the United States Customs Laboratory in Chicago, Illinois, and reported by the laboratory to be "sponge iron powder containing no dutiable amounts of chromium, vanadium, molybdenum or tungsten." [See customs laboratory report, dated November 25, 1969, in entry No. 106504 of protest 3801–0–000035.] This was prior to liquidation of the subject entries. And the same reports were made by the United States Customs Laboratory in Boston, Massachusetts, following examination of samples of Atomet 28 taken from other shipments entered at the ports of Champlain and Buffalo, New York. [See exhibits 82 through 84.]

Apparently, classification of the instant merchandise proceeded upon the basis of guidelines contained in the headquarters ruling of September 14, 1971, wherein the Customs Service stated (exhibit 86):

> If an imported powder is found to be truly porous throughout under microscopic examination [500X – 700X] of a ground and polished section, it should be classified as sponge iron powder under either item 608.02 or 608.04, TSUS, depending upon metallic content. If, on the other hand, the particles are generally solid at the core, the powder should then be classified either as

other powder in item 608.05, TSUS, or as an alloy powder in item 608.06 or 608.08, TSUS, again depending upon metallic content.

In the event of any remaining doubt as to the proper classification, information as to the process by which the imported powder was made should be obtained. If the powder was produced by the solid state reduction of iron oxide below the melting point of iron, then the resulting product is sponge iron. If the imported powder was produced by atomization, or some other similar process involving heating the raw material to a molten state, the resulting product should be classified under one of the provisions for other powders.

But in the Summaries of Trade and Tariff Information (1967) the Tariff Commission, reporting on commodities under TSUS items 608.02 and 608.04, stated [exhibit 85, p. 57]:

Sponge iron is a porous spongelike material generally in the form of a cake and usually containing 96 percent or more of iron, the remainder being largely of carbon. In the United States sponge iron is produced principally by reducing uniform high-grade iron ore with coke at temperatures well below the melting point of iron. Sponge-iron powder, a virtually pure, finely divided, iron containing as much as 98.5 to more than 99 percent by weight of iron, is produced by pulverization of the sponge-iron cake. The pulverized iron is annealed in a hydrogen atmosphere to eliminate the effects of the cold working (pulverizing) and also to further reduce the content of carbon and oxygen.

Sponge iron is also produced by the atomization of molten cast iron or steel scrap of carefully selected analysis. The atomization introduces oxygen into the material; however, the oxygen, as well as the carbon contained in the scrap, can be minimized by heat treatment. The heat treatment results in a cake of sponge iron which is converted to sponge-iron powder by milling.

And the findings of the Tariff Commission, relative to the existence of more than one process for the manufacture of sponge iron, find support in the published writings of Dr. W. D. Jones,[1] a noted English power metallurgist whom expert witnesses for both parties herein acknowledge as a leading authority in the field of powder metallurgy. [See exhibit 10, p. 47, wherein Dr. Jones calls attention to a number of "modern sponge iron processes".]

The method of manufacture of the imported merchandise, Atomet 28, is described in the testimony of Dr. Harry Durney, Jr., vice president of Quebec Iron and Titanium Corporation (the parent company of the exporter Quebec Metal Powders) in charge of planning and technology, with similar responsibilities for Quebec Metal Powders. According to Dr. Durney the process starts with molten

[1] Fundamental Principles of Powder Metallurgy (1960), pp. 47–50.

iron containing 4 percent carbon which comes from the Quebec Iron and Titanium smelter. The initial step involves the granulation of the molten iron with water and air in order to disintegrate the particles. The disintegration causes the molten iron to be converted into coarse granules and the medium of air causes oxidation of the iron. The air is drawn through the atomization zone in order to oxidize the material.

The coarse granules are then dried, and then the granules are reduced in size by ball milling.

The ball-milled material is then passed through a reduction furnace. The furnace operates in a temperature range of 1,850 to 1,950 degrees Fahrenheit, which is below the melting point of iron. The atmosphere in the furnace is nitrogen and hydrogen which is created by the disassociation of ammonia. In the furnace, carbon and oxygen unite to form carbon monoxide and excess oxygen in the material reacts with the hydrogen present to form water vapor.

The discharge from the reduction furnace is a sponge iron cake. And this cake, a sample of which is in evidence as exhibit 5, is then put through an attrition mill which breaks it down to powder size. The powder is then screened, any oversizes are removed, and is finally blended to obtain uniform powder, culminating in the product Atomet 28, a sample of which is in evidence as exhibit 6.

Dr. Durney further testified that when Atomet 28 was first imported into the United States in early 1969 it was classified by the Customs Service under TSUS item 608.02, which is the provision for sponge iron, and that the classification for this merchandise was subsequently changed.

Dr. Joel S. Hirschhorn, professor of metallurgical engineering at the University of Wisconsin and consultant to the powder metallurgy industry testified that he made an extensive visit in the manufacturing plant where Atomet 28 is made, and is familiar with its manufacture. Professor Hirschhorn corroborated the testimony of Dr. Durney to the effect that the product which comes out of the reduction furnace is a sponge iron cake which is mechanically broken up to produce the final sponge iron powder. Much of the testimonial and other evidence given by this and other witnesses who followed him goes into considerations of particle characteristics, testing procedures and apparatus and procedures for examining individual iron particles and groups of particles under high magnification with a view toward ascertaining whether or not the particles are sponge iron particles. Professor Hirschhorn stated that there is substantial porosity in Atomet 28, that this porosity is caused by the presence of iron oxide, and that in his opinion Atomet 28 is a sponge iron powder. And the witness also pointed out, among other things, that the breaking up of the sponge iron cake affects the distribution of the porosity.

Dr. Leander Pease, cofounder-owner of Powder-Tech Associates, Inc. of Burlington, Massachusetts, which engages in research, development, and engineering in all areas of powder metallurgy, testified that his company does consultation work for producers of metal powders and metal parts fabricators, among others, and that he gained familiarity with Atomet 28 from having examined samples of it in connection with industry consultations, and also gained familiarity with the manufacturing process as a result of having visited the plant in Sorel on several occasions. Dr. Pease stated, among other things, that the ball-milled feed material is put into a reduction furnace and that the product coming out of the furnace at the discharge end is "a sponge iron cake" which is later milled to achieve the final Atomet 28 product.

With respect to exhibit 72 (A & B) which represents scanning electron microscope micographs of QMP Atomet sponge iron cake, Dr. Pease testified (R. 392–93):

> Q. I show you Plaintiff's Exhibit number 72 and ask you to explain what it shows.
> A. Exhibit 72 "A" and "B" are of the Q.M.P. Atomet sponge iron cake, which is the product that issues from the discharge end of the reduction furnace. In this case a piece of the cake was fractured, and then its fractured surface examined at 1350X and 2400X.
> The most important feature to notice in this is that the particles that are present at this discharge end of the furnace indeed are porous.
> Here's an example in the lower picture. In the upper left hand corner this particle clearly shows dark round porosity; so does this one down here on the lower left hand side. You can also see at this stage that there are, indeed, particles which are not porous, and I think that this elongated particle on the upper right hand side here doesn't show any evident surface porosity, although there are some other pieces laying here.
> Q. Is there any theme that runs through both of those photographs?
> A. Yes. We have to say that we're looking at a porous material here. There's no question about it.

And with respect to the nature of a pore of an individual powder particle of Atomet 28 examined at great length, Dr. Pease testified (R. 401–03):

> Q. Dr. Pease, with specific reference to Exhibit 74, could you explain what that exhibit shows?
> A. I could. What we have done in this case is taken a mount of the Atomet-28 powder, prepared in the way that I described before, but what we wanted to do was to see how the shape of an individual pore might change in a given particle as you went down through successive layers in that particle because generally when one examines a material by optical micrograph one is look-

ing at one plane. What we will show here is that if you look at different planes with the same particle you see somewhat different things. So that you have to be a little careful in conclusions that you draw from this one picture. We found one particular pore which had a characteristic shape to it and that characteristic shape was this triangular pore. We didn't hunt around for a particularly spongy particle or substantially solid one but really only a pore that could be readily identified. And this we did because we have to go and polish this thing for a certain length of time and then go back and find the same particle amongst several millions of others. It takes a careful procedure to be sure you can find the same particle. We were able to do that successfully. So, the picture then from the left to right in here show what the results were on that one particular particle after polishing. The numbers below it represent the cumulative material we removed in inches. They are very small numbers. But the sum total from this end down to here is about a half a thousand or five ten-thousandths of an inch material removed. You can see that first of all this pore is not just some artifact right at the surface but that it runs in a very definite finite depth in toward here ending up rotated about 90 degrees and down, as it appears over here. Another interesting thing, you can take something relatively solid at this end or view and polish off half a thousandth of an inch and you have got something that looks like a very porous kind of particle. So it helps point out very graphically the problems in what you can learn in the polishing. . . .

Dr. Pease stated that he considers Atomet 28 to be porous, and that it is a sponge iron powder. He also pointed out that in the QMP process the iron oxide is deliberately introduced during the "granulation step", and that there are several different methods of manufacturing sponge iron powder, depending upon the starting feed material which is used.

Other witnesses who testified in the case do not appear to have seen the manufacturing process underlying Atomet 28, but appear to have examined the powder itself in various ways. Dr. Eric John Chatfield, senior research scientist at the Ontario Research Foundation near Toronto, Canada, and head of the electron optical laboratory, testified that he examined samples of Atomet 28, among other iron powders, under a scanning electron microscope, an electronic device which he described in some detail. He concluded from his examination of Atomet 28 that its small particles are more porous than its large particles, and that porosity in the particles examined extends from the surface down into the interior of the particles.

So much for testimony elicited from witnesses called on plaintiff's behalf.

Defendant called four witnesses on its behalf. George Abbott, vice president and general manager of A. O. Smith-Inland Powder Metallurgical Division who supervises the production, planning and direct

research of the metal powder operation, testified that he examined samples of Atomet 28 and is familiar with the process by which it is made. [The record does not indicate how he acquired his familiarity with the Atomet 28 process.] He stated that he does not consider Atomet 28 to be a sponge iron powder although it has porosity because its manufacture involves a liquid stage which indicates its classification to be an "atomized" powder.

Athan Stosuy, manager of new product development at Hoeganaes Corporation testified that his duties include keeping track of competition, evaluating materials and determining his company's competitive position among its competitors, that Hoeganaes competes with Quebec Metal Powders in the sale of iron powders in the United States, and that such competition extends to the product Atomet 28. The witness testified that Hoeganaes filed an American manufacturer's protest with the Customs Service asking that Atomet 28 be classified not as a sponge iron powder but as other iron powders, and that this protest culminated in a new ruling by the Customs Service which is reflected in exhibit 86, *ante*.

Mr. Stosuy testified that he received samples of Atomet 28 in various stages of production, conferred and collaborated with Dr. Henry Hausner in having tests and examinations made on these samples with a view toward characterizing the powder and ascertaining the oxygen content and oxide distribution at different stages of production. According to the witness the oxygen content after atomization was found to be 6.1 percent which represents 24.4 percent iron oxide by weight. The carbon content was found to be relatively high at 2.74 percent which made the powder very brittle. The ball-milled material had generally finer sized particles, and the oxygen content was found to be 5.18 percent which represents about 21 percent iron oxide by weight. In looking at exhibit S, a photomicrograph of Atomet 28 annealed cake taken at a magnification of 200X, Mr. Stosuy stated that the view shown represented a true cross section since the material is sintered together and had no chance to separate. The porous particles were mainly confined to the finer sizes, and the spongy particles outnumbered the solid particles but the solid particles outweighed the spongy particles. The ratio of porous particles to solid particles was said by the witness to be in the order of 17/93 which he could not consider to be a sponge iron powder, viewing the powder as a whole.

When asked by the court what the value of porosity was, Mr. Stosuy said that it was the particles' ability to hold together when they are pressed—referred to as "green strength". The witness was of the opinion that in order for a powder to be called a sponge iron powder it would have to be porous in essentially every particle. And he said that he considered Atomet 28 to be an atomized powder.

Dr. Henry H. Hausner, a consulting engineer in powder metallurgy, editor of powder metallury books and journals, and a teacher in powder metallurgy, testified that the characteristic of sponge iron powder is interconnected porosity extending from the center of the particle to its surface in the manner of an ordinary sponge. He stated that when he received samples of Atomet 28 to which Mr. Stosuy referred he decided to separate the fine particles from the course particles. His experience had been that the fine particles have different characteristics than the coarse particles. He also ordered an apparent density measurement on samples, followed by microscopic investigation. He said that in looking at hundreds of views of Atomet 28 he saw four different types of particles, i.e., particles which did not contain any porosity, particles which contained only surface porosity, particles with partial porosity, and particles which were perfectly spongy.

Dr. Hausner estimated on the basis of his examination of Atomet 28 samples that the powder consisted of approximately 20 percent sponge iron particles, in consequence of which, he did not consider Atomet 28 to be a sponge iron powder, but believes it to be a "mixed powder", containing a minority of spongy particles by weight. And Dr. Hausner agreed with the statement from an article authored by Messrs. Leadbeater, Northcott and Hargreaves on page 90 of the book Iron Powder Metallurgy Book which he edited, and which reads "The specific surface of iron powders is not independent of the porosity of the bed, owing to the presence of a double system of porosity; there is one system around the powder particles and the other inside them."

Harry Ambs, a powder metallurgist employed as manager of technical service for the metals group of Glidden Metals, testified that he was also of the opinion that Atomet 28 was a mixed metal powder, and not an atomized powder as he had originally thought it to be based upon his examination of a sample when it first came out on the market and the manufacturer's literature available at that time. From the evidence given at the trial in this case the witness said that he was of the opinion that Atomet 28 possessed some particles of low density, high porosity, and some particles of high density and low porosity as the end product of a manufacturing process similar to the Mannesmann process which he says Jones regards as producing a mixed metal powder. And he does not consider Atomet 28 to be a sponge iron powder because the solid, dense particles predominate by weight in this powder.

Mr. Ambs did admit, however, that every particle of an iron powder need not be porous in order for the powder to be designated a sponge iron powder. And he pointed to a number of solid particles in photo-

micrographs and SEMs of an Ancor MH100 powder which was acknowledged to be a sponge iron powder. He also stated that the tests he would perform on Atomet 28 in order to determine if it is a sponge iron powder would include tests of its compressibility and green strength. He had previously pointed out that one of the weaknesses of an atomized powder was its low green strength.

Plaintiff argues that a limited amount of iron oxide can result in a powder that is very spongy and definitely a sponge iron powder, that the feed material need not be 100 percent iron oxide in order to produce a sponge iron powder, and that Atomet 28, when judged as a whole as it should be judged, is a sponge iron powder and not a mixed powder (brief, p. 62).

Defendant argues (brief, pp. 44, 47):

> The Government does not dispute the fact that there are sponge iron particles in Atomet 28. There is a controlled amount of iron oxide which is formed during the atomization process which subsequently becomes sponge iron after completing the annealing reduction process.
>
> Since an amount of sponge iron does exist, we then must look to see what amount of sponge iron is produced in Atomet 28. . . .
>
> * * * * * * *
>
> It is manifest from the uncontradicted chemical analysis which Mr. Stosuy conducted on Atomet 28, in its various stages of production, that the sponge iron content of Atomet 28 is in the minority by weight when compared to the solid atomized particles. The only source of sponge iron in Atomet 28 is the iron oxide which is created during the atomization process. The iron oxide content is controlled and geared to the carbon content of the molten material which is to be atomized. Since the sponge iron content of Atomet 28 is relatively small, the presence of such a small quantity, by weight, of sponge iron should not be controlling in determining its classification.

Defendant goes on to conclude that Atomet 28 is not a sponge iron powder although the small sponge iron particles are distributed throughout the powder because porosity *does not occur throughout all the particles.*

The evidence in the record shows that the feed material for the manufacture of Atomet 28, the imported merchandise, is artifically produced by a process which includes an atomization step. However, after the creation of this iron oxide material and ball milling of it, the record shows that the material is subjected to solid state reduction and annealing steps to produce the cake, the basic product from which the imported merchandise is derived by pulverization.

The government chemists at two separate regional laboratories have analyzed the imported merchandise and other importations of

it on separate occasions and have concluded that it is sponge iron powder, and this, both before and after guidelines were handed down by the Customs Service regarding the classification of such merchandise. Moreover, the Tariff Commission, whose many functions include the monitoring of the origins of imported merchandise and their uses in commerce and industry, reports that products manufactured in the two-stage method described for the production of the instant merchandise, i.e., liquid state production of iron oxides followed by solid state reduction of the oxides, are recognized in the industry as sponge iron powder—a posture which is supported by the testimony of at least half of the powder metallurgists giving testimony in this case. And the government concedes in this case that some sponge iron exists in the imported merchandise.

What the case comes down to then is how significant is the government's "mixed powder" concept and balancing of particles as a predicate for sustaining classification of the subject merchandise in the face of such cogent evidence that the instant merchandise is sponge iron powder.

Defendant states (brief, p. 57):

> . . . The mixed powder theory is not new since Dr. Jones in his *Fundamental Principles of Powder Metallurgy* (introduced by plaintiff) considered Mannesmann RZ process to produce a mixed iron powder. This Mannesmann process is similar to the process used for the production of Atomet 28. . . .

Undoubtedly, this argument reflects the testimony of defendant's witness Ambs previously noted herein who, like the other powder metallurgists who testified in the case, considers Dr. Jones to be a well respected authority in the field of powder metallurgy.

In the court's view both counsel for the government and Mr. Ambs have misread Dr. Jones' statements in this instance. The words "mixed powder" were not employed by Dr. Jones, but by Mr. Ambs. Dr. Jones used the phrase "a mixture of particles with high density and low microporosity with particles of low density and high microporosity" in discussing the characteristics of the powder product of the Ferrum process. [Exhibit 10, p. 48.] And the words "mixed particles" do not bear the same meaning in this context as the words "mixed powder" because Dr. Jones is discussing only sponge iron powders under the heading REDUCTION OF OXIDES [exhibit 10, p. 8], and is comparing the advantages and disadvantages of the various sponge iron powders produced by different methods. Thus, according to Dr. Jones, the Mannesmann process [Naeser] is deemed to be a more expensive process than a *typical sponge iron process* because of its three-stage tier, i.e., preparation of melt, atomization, and

reduction, but that at the same time the Mannesmann process is capable of much larger expansion in the future than the Hoeganaes process, among others. because of its independence of magnitude of supply of selected concentrates, among other things. [Exhibit 10, p. 50.]

Therefore, contrary to the assertions made by government counsel and the witness Ambs, it is clear that the concept of mixed particles in an iron powder is compatible with the designation of that powder as sponge iron as is manifest in the documented research of a renowned and respected powder metallurgist. And no attempt is made to differentiate between the mixed particles in terms of respective weights for any purpose. Moreover, in its "mixed powder" argument, defendant's rejection of the solid, irregular particles is based upon a consideration of only intra-particle porosity. But inasmuch as the value of porosity is said to relate to the green strength rating of a compressed powder it is clear that the efficacy of inter-particle porosity, a pertinent factor recognized by the government's witness Hausner, must necessarily be taken into consideration even with respect to these seemingly solid and irregular shaped particles in the evaluation of the powder mass.

Certainly, the credible evidence in this case indicates that no iron powder reputed to be sponge iron powder contains intra-particle porosity in every particle. And from the court's own examination of the micrographs [2] of both the cake and powder forms of Atomet 28 the court is of the opinion that substantial intra-particle porosity exists in this product such that it can be said to be a porous iron powder. Consequently, the court finds no merit in the government's "mixed powder" theory, and it should not influence the classification of the instant merchandise.

Furthermore, it should be noted that the guidelines handed down by the Customs Service (exhibit 86) do not *ipso facto* mandate classification of iron powders by the administrative officials at the ports of entry, but leave the determination of classification to those officials charged with the responsibility for scrutinizing and analyzing the powders. Under the circumstances of this case the court is of the view that the district director should have followed the recommendations of the Customs chemists at Chicago who reported the subject merchandise to be sponge iron powder.

For the reasons stated, the claim of the plaintiff is sustained. Judgment will be entered accordingly.

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[2] (That includes slides of stereo pairs projected onto a movie screen in the courtroom during the trial which very convincingly disclose in three dimensions the in-depth porosity of Atomet 28 powder particles)

(C.D. 4636)

W & J SLOANE, INC. *v.* UNITED STATES

Wood products

Hand carved wooden panels, imported from Hong Kong, in configurations of four, six, eight and twelve panels of various heights and weights, known as "Coromandel screens," were classified as wood screens under item 206.67 of the tariff schedules, as modified by T.D. 68–9, dutiable at the rate of 40, 36 or 32 percent ad valorem, depending upon the date of entry. Plaintiff's claim for classification under item 207.00 of the schedules, as modified by T.D. 68–9, as articles not specially provided for, of wood, is overruled.

BURDEN OF PROOF—WOOD SCREENS—ITEM 206.67

Proof that the imported merchandise did not necessarily conform to the traditional uses of screens was not sufficient to discharge plaintiff's dual burden of proof. It was also incumbent upon plaintiff to establish that the claimed classification was correct, i.e., it more appropriately or more specifically described the items at bar.

SCREENS—COMMON MEANING

The imported merchandise was screens within the legislative intendment of item 206.67 covering wood screens, an *eo nomine* provision, as revealed by an examination of the summaries of tariff information. Lexicographic sources also establish that the term "screens" includes decorative screens. The blending of a utilitarian and decorative function in an imported article does not remove it from the category which describes it *eo nomine*. *Naumes Forwarding Service* v. *United States*, 55 Cust. Ct. 132, 137, C.D. 2562 (1965). The *eo nomine* provision for wood screens includes all forms of screens. *Nootka Packing Co. et al.* v. *United States*, 22 CCPA 464, 470, T.D. 47464 (1935).

COMPETING TARIFF PROVISIONS—GENERAL INTERPRETATIVE RULE 10(c)

Rule 10(c), which requires that "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it," is applicable in the instant case since the Coromandel screens are more specifically provided for under the *eo nomine* provision for wood screens. *Sanji Kobata et al.* v. *United States*, 66 Cust. Ct. 341, C.D. 4213, 326 F. Supp. 1397 (1971) distinguished, where proof of use of "byobu screens" established their proper classification under the more specific provision for paintings. The tariff provision in the instant case competing with the *eo nomine* provision for wood screens (206.67) was not one covering works of art of wood, but a basket provision for articles of wood (207.00). See *Chew Hing Lung* v. *Wise*, 176 U.S. 156 (1900); *Arthur* v. *Lahey*, 96 U.S. 112 (1878); *United States* v. *Astra Trading Corp.*, 44 CCPA 8, C.A.D. 627 (1956); *Atlanta Trading Corp.* v. *United States*, 42 CCPA 90 C.A.D. 577 (1954).

Court Nos. 68/23087, etc.

Port of New York

[Judgment for defendant.]

(Decided February 19, 1976)

Rode & Qualey (*Michael S. O'Rourke* and *Peter Jay Baskin* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis*, trial attorney), for the defendant.

RE, Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise imported from Hong Kong between 1967 and 1969. The merchandise, consisting of hand carved wooden panels in configurations of four, six, eight and twelve panels of various heights and weights, is known as "Coromandel screens."

The Customs Service classified the merchandise under item 206.67 of the Tariff Schedules of the United States [TSUS], as modified by T.D. 68–9, as "[w]ood * * * screens," and imposed a duty at the rate of 40, 36 or 32 percent ad valorem, depending upon the date of entry.

Plaintiff contests that classification and claims that the merchandise is properly classifiable under item 207.00, TSUS, as modified by T.D. 68–9, as "[a]rticles not specially provided for, of wood," and that the duty rate should therefore have been only 16⅔, 15 or 13 percent ad valorem, depending upon the date of entry. In essence, it is plaintiff's contention that, since the Coromandel screens are not used to "shield light, heat, or wind, or to effect privacy," they are not screens within the meaning of item 206.67 of the tariff schedules. Maintaining that they are not "screens," plaintiff, in its brief, refers to the merchandise as "Coromandel wall panels." It succinctly describes their use as follows:

> "* * * Coromandel wall panels are highly decorative articles used to beautify and enrich the surroundings in which they are installed. In this respect, they resemble or take the place of paintings, wall hangings, or other non-utilitarian articles of admiration and contemplation and are used in the same manner as paintings, wall hangings, or other non-utilitarian articles of admiration and contemplation which enhance the esthetic appeal of any room."

It is axiomatic in the law to state that the legal conclusion is dictated by the facts of the particular case. The thought is expressed well by the latin maxim *ex facto jus oritur*. In customs classification cases it is equally fundamental to state that the proper classification of

imported merchandise also depends upon the competing tariff provisions. In the case at bar, the pertinent provisions may be set forth as follows:

Classified under:

Schedule 2, part 1:

"Subpart E. – Miscellaneous Products of Wood

* * * * * * *

Wood blinds, shutters, screens, and shades, all the foregoing, with or without their hardware:

* * * * * * *

206.67 Other ..... * * *"

Claimed under:

"Subpart F. – Articles Not Specially Provided For, of Wood

Subpart F headnote:

1. This subpart covers all products of wood which are not provided for elsewhere in the tariff schedules.

207.00 Articles not specially provided for, of wood ..... * * *"

Simply stated, the question presented is whether the Coromandel screens have been correctly classified as wood screens under item 206.67, or whether they should have been classified as articles not specially provided for, of wood, under item 207.00.

Although elementary, it is pertinent to state that, in customs classification cases, plaintiff bears the dual burden of proving that the classification ascribed to the merchandise by the Customs officials is wrong, and that the claimed classification is correct. The facts and the competing tariff provisions of the present case highlight the reason and purpose which impose this dual burden upon the plaintiff. Specifically, plaintiff will not succeed simply by showing that the uses of the Coromandel screens do not necessarily conform to the traditional or usual uses of screens. Rather, to prevail plaintiff must also prove that, in accordance with principles of customs law, its claimed classification is correct, i.e., it more specifically or more appropriately describes the merchandise.

Notwithstanding the excellence of its presentation, plaintiff, for a variety of reasons, could not and did not succeed in meeting this dual burden. Its claim must, therefore, fail.

It is basic in customs law that an *eo nomine* provision for an article, without limitation or contrary legislative intent, judicial decision, or administrative practice, includes all forms of the article. *Nootka Packing Co. et al.* v. *United States*, 22 CCPA 464, 470, T.D. 47464 (1935). The parties are in agreement that tariff item 206.67 for wood screens is an *eo nomine* provision. Clearly, therefore, if the Coromandel screens are indeed screens, within the legislative intendment of the provision for wood screens, they have been correctly classified, and plaintiff's protest must be overruled.

There was no evidence presented at the trial that the commercial meaning of "screens" was different from its common meaning. Therefore, it is only necessary to determine whether the imported merchandise consists of "screens" within the common meaning of that term. *Moscahlades Bros., Inc.* v. *United States*, 42 CCPA 78, 82, C.A.D. 575 (1954); *Nomura (America) Corp.* v. *United States*, 62 Cust. Ct. 524, 527, C.D. 3820, 299 F. Supp. 535 (1969), *aff'd*, 58 CCPA 82, C.A.D. 1007, 435 F.2d 1319 (1971).

The defendant, in support of its contention that the Coromandel screens are screens within the meaning of item 206.67, has submitted lexicographic definitions found in *Webster's Third New International Dictionary of the English Language, Unabridged* (1963) at page 2040:

> "screen 1: a device used as a protection from the heat of a fireplace or from drafts or as an ornamental piece: as a: a folding temporary partition consisting of hinged leaves usu. made of wood or metal framework covered with cloth, leather, or paper
> * * *
> "2a: a nonbearing partition that may be solid or pierced, is often ornamental, and is carried up to a height necessary for separation and protection."

It has also quoted extensively from the discussion of "screen" found in the *Encyclopaedia Britannica*, Volume 20, 14th edition, 1929. This treatment, under the heading of "Screens of China and Japan," deals specifically with "Coromandel screens," and is helpful in understanding the nature of the merchandise in issue.

More significant, however, are the following quotations from the 1948 *Summaries of Tariff Information*, and the 1968 *Summaries of Trade and Tariff Information:*

> 1948 *Summaries of Tariff Information*, Volume 4, page 80 (with reference to paragraph 411, Tariff Act of 1930):
>
> "The products covered by this summary include woven roll shades, venetian blinds, 2-, 3-, or 4-section folding screens, *ornamental screens*, and various other types of utility and *ornamental* blinds, curtains, shades, and screens. These are generally made of wood, bamboo, straw, papier mâché, palm leaf, or compositions of wood." (Emphasis added.)

1968 *Summaries of Trade and Tariff Information*, Schedule 2, Volume 2, pages 85–87 (with reference to the provision for wood screens):

"The articles included here ordinarily are completely assembled wood shutters, blinds, shades and screens, with or without their hardware. * * *

* * * * * * *

"Utility or *decorative* screens usually consist of rectangular wooden frames in sizes comparable to those of shutters. Each frame encloses a thin panel of wood, cloth, plastic, paper, or other material, which may be plainly finished or *highly decorated*. Each frame may have leg members or a supporting stand, and generally three or four frames of the same size are hinged together to make a complete screen. Such movable screens are used to separate, conceal, shelter, or protect room and porch areas.

* * * * * * *

"The use of wood *decorative* screens has also been rising. Such screens, which have frames of wood, but may have panels of plastics or textile material, are increasingly used as *ornamental* screens and interior room dividers in modern homes." (Emphasis added.)

The quoted sources leave no doubt that the term "screens," includes screens that are "highly decorated," "decorative" and "ornamental"; i.e., decorative screens. As stated in the 1968 *Summaries*, screens may be either "utility or decorative."

It is often stated in customs classification cases that the controverted articles themselves are potent witnesses. Indeed, their careful examination may dictate a classification within a particular tariff provision. *United States* v. *The Halle Bros. Co.*, 20 CCPA 219, T.D. 45995 (1932); *Leaf Brands, Inc.* v. *United States*, 70 Cust. Ct. 66, C.D. 4409 (1973). A viewing of the Coromandel screen exhibited during the trial, and a study of the various exhibits submitted by the parties, indicate that the Coromandel screens or Coromandel "wall panels" are *decorative screens.*

Several features may be stated for the conclusion that Coromandel screens are decorative screens. First, it is not disputed that they are decorative. Indeed, plaintiff has taken great pains to prove that a "Coromandel is not a simple screen," but is an artistic creation having artistic merit, and is "installed in rooms for decorative purposes." Second, Coromandel screens have legs so that they may stand or be affixed to the floor in accordion fashion. Third, they have design, decoration or decor on both sides, so that when used as a room divider, the decoration is present on both sides of the divided area. Fourth, the Coromandel screens are sufficiently large and tall to perform the functions of screens.

The fact that the Coromandel screens are "decorative" does not mean that they are not also functional. Plaintiff's exhibits illustrate the dual purpose or nature of the importations. Some of the pictures show Coromandel screens covering, in an accordion fashion, a corner of a dining room or bedroom. In addition to providing "emphasis" or a "focal point" they perform the utilitarian function of smoothing, rounding out, removing from view, or concealing an otherwise "bland" or vacant corner.

Additionally, the record is replete with testimony that the Coromandel screens are referred to as screens even by plaintiff's witnesses themselves. One witness testified that they would be screens except for their decor, and that Coromandel screens are distinguishable from screens only by their use. The testimony, in distinguishing screens by their "decor," is contradicted by the lexicographic and other sources cited which show that the term screens includes *decorative screens*.

On the facts and competing tariff provisions of the present case, the successful blending of a utilitarian and decorative function in an imported article does not remove that article from the tariff category which describes it *eo nomine*. As stated in *Naumes Forwarding Service* v. *United States*, 55 Cust. Ct. 132, 137, C.D. 2562 (1965): "[t]he fact that it is decorative does not indicate it is not a screen."

Also pertinent to the case at bar is the following sentence from the *Naumes* case:

> "While use may be of paramount importance in determining the identity of an article (*United States* v. *Quon Quon Company*, 46 CCPA 70, 73, C.A.D. 699), we do not think the weak use testimony here is sufficient to establish that these articles are not used as screens, *when other factors, such as their shape, construction, and resemblance to the well-known oriental folding screen, proclaim that they are.*" (Emphasis added.)

Although the use testimony in the present case may not be said to be "weak," there is no doubt that the Coromandel screens are "the well-known oriental folding screens" and proclaim what they are to all who view them.

Plaintiff's testimony at the trial concentrated on the use of the Coromandel screens. The emphasis upon use was obviously an attempt to bring the case within the reasoning of *Sanji Kobata et al.* v. *United States*, 66 Cust. Ct. 341, C.D. 4213, 326 F. Supp. 1397 (1971). In *Sanji Kobata* certain Japanese "byobu" screens had been classified as "wood screens" under item 206.67 of the tariff schedules. Plaintiffs therein claimed that they were properly classifiable under item 765.03 of the tariff schedules which provided for "[p]aintings * * * executed wholly by hand." The question presented was whether plaintiffs succeeded in establishing that the byobu *screens* were not screens, as

classified, but rather *paintings*, as claimed. On the facts, and the competing tariff provisions, this court held that they were paintings for tariff purposes.

In *Sanji Kobata*, on the question of appearance of an article and its use, it was stated:

> " * * * in the case at bar, although 'screens' might initially be a reasonable way to describe or refer to the articles in question, that designation commences to vanish as credible testimony is introduced showing a use that makes a different classification more appropriate. * * * " (Emphasis added.) 66 Cust. Ct. at 349.

The question to be answered is whether testimony as to use "makes a different classification more appropriate." Hence, the thrust of the reasoning of *Sanji Kobata* may be summarized by saying that the label that is placed upon imported merchandise, whether it be "byobu screen," or "Coromandel screen," does not foreclose further inquiry as to its proper classification for customs purposes. A careful examination of the byobu screens and their use in *Sanji Kobata* persuaded the court that they were *paintings* within the claimed tariff provision. This examination caused the court to observe that the screen was merely the surface, comparable to a canvas, upon which the artist painted the landscape or other picture. Indeed, the court noted that the finished artistic creation was embraced in the dictionary definition of a "painting" as a "decoration achieved by applying paint to a surface."

In addition to the testimony as to use, other factors warranted the classification of the byobu screens as "paintings." For example, it was clear that the byobu screens were designed to satisfy the demand in the United States for wall hangings. Unlike the Coromandel screens, only one side was decorated or adorned with the painting. Moreover, the byobu screens were smaller "and are not the larger size screens that are furniture and serve the function of screens." *Sanji Kobata et al.* v. *United States*, 66 Cust. Ct. at 353. Proof of use in *Sanji Kobata*, as confirmed by the physical characteristics of the byobu screens themselves, not only indicated that they were not used as screens, but also proved that they were used as paintings. Proof of use was helpful in identifying the article in order to determine whether they were "screens," as classified, or more appropriately, "paintings," as claimed. The court in *Sanji Kobata* held that as between those two tariff provisions, "paintings" was more appropriate.

The *Sanji Kobata* case is clearly distinguishable from the case at bar. On the facts, the byobu screens of *Sanji Kobata* differed from the Coromandel screens presently before the court. At the trial of the case at bar, plaintiff brought into the courtroom a seven foot high, eight panel Coromandel screen, a photograph of which was admitted into evidence as plaintiff's illustrative exhibit 1. The byobu screens were

considerably smaller, had no legs and contained no painting on the back. The byobu screens were merely the canvas that contained the oriental hand painting and were hung on walls precisely as paintings. More important, in *Sanji Kobata* the competing provisions were *wood screens*, under item 206.67 of the tariff schedules, and *paintings*, under item 765.03 of the schedules. A thorough examination of the byobu screens, the testimony as to use and the exhibits in that case, led to the conclusion that the articles were *paintings*, as claimed.

However obvious, perhaps it is well to repeat that in *Sanji Kobata* plaintiffs succeeded in showing that the merchandise was described in an existing tariff provision for "paintings." In the case at bar, plaintiff has emphasized the artistic nature of the Coromandel screens and, by the careful introduction of testimony as to use, attempted to show that they are creations, and works of art of wood. Unfortunately for plaintiff, it labored mightily to fit the imported merchandise into a customs classification that does not exist in the tariff schedules.

Plaintiff correctly points out that the "competing tariff provisions in this action both cover merchandise 'of wood'." It is in error, however, when it asserts that the Coromandel screens are "not provided for elsewhere in the tariff schedules."

Defendant concedes that item 207.00 of the tariff schedules describes the Coromandel screens, since, clearly, they are articles of wood. It points out, however, that item 207.00 is a general or "basket" provision for articles of wood. Item 206.67 of the tariff schedules is more specific, being an *eo nomine* provision for wood screens. Defendant, therefore, indicates the applicability of General Interpretative Rule 10(c) which provides that:

> "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; * * *"

Rule 10(c), in effect, codifies a rule of eminent good sense that if an imported article is described in two or more tariff provisions it is to be classified under the provision which describes it most specifically.

This rule of relative specificity, as it is known in customs law, is applicable to the case at bar since the Coromandel screens are more specifically provided for under the tariff provision for wood screens. As stated by the Supreme Court: "* * * the designation of an article, *eo nomine*, * * * must prevail over words of a general description which might otherwise include the article specially designated." *Chew Hing Lung* v. *Wise*, 176 U.S. 156, 160 (1900). See also *Arthur* v. *Lahey*, 96 U.S. 112 (1878); *United States* v. *Astra Trading Corp.*, 44 CCPA 8, 11, C.A.D. 627 (1956); *Atalanta Trading Corp.* v. *United States*, 42 CCPA 90, 94, C.A.D. 577 (1954); *United States* v. *Hatters' Fur Exchange*, 1 Ct. Cust. Appls. 198, T.D. 31237 (1911).

It is the determination of the court that the Coromandel screens were properly classified under item 206.67 of the tariff schedules, the *eo nomine* provision for wood screens. Their decorative or artistic features do not change their fundamental nature as screens within the *eo nomine* provision which embraces all forms of the article.

In view of the foregoing, the tariff classification of the imported merchandise by the Customs officials is sustained, and the protests are hereby overruled.

Judgment will issue accordingly.

(C.D. 4637)

ATAKA AMERICA, INC. *v.* UNITED STATES

Fiberscope

Court No. 73-6-01576-S

Port of New York

[Judgment for plaintiff.]

(Decided February 20, 1976)

Rode & Qualey (*Ellsworth F. Qualey* and *Peter Jay Baskin* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John A. Gussow* and *Jerry P. Wiskin*, trial attorneys), for the defendant.

BOE, Chief Judge: The merchandise in question in the above-entitled action, described on the commercial and special invoices as "Olympus Upper GI Photofiberscope, Model GIF-D, without CLE and FIT," was imported from Japan and entered at the port of New York on April 18, 1972.*

Upon liquidation the merchandise was classified under item 709.05, TSUS, as modified by T.D. 68-9, providing:

Schedule 7, Part 2, Subpart B, TSUS

	Medical, dental, surgical and veterinary instruments and apparatus (including electro-medical apparatus and opthalmic instruments), and parts thereof: Optical instruments and appliances, and parts thereof:	
	* * * * * * * *	
709.05	Other	25% ad val.

*CLE is a specially designed light power unit used in connection with the fiberscope. FIT is a camera specially designed for use in connection with the fiberscope.

The plaintiff, however, contends that said merchandise is more than a medical-optical instrument and claims that the same is properly classified as an electro-medical apparatus, and parts thereof, under item 709.17, TSUS, as modified by T.D. 68–9, providing:

Schedule 7, Part 2, Subpart B, TSUS

	Medical, dental, surgical and veterinary instruments and apparatus (including electro-medical apparatus and opthalmic instruments), and parts thereof: Optical instruments and appliances, and parts thereof:	
	* * * * * * *	
	Other:	
	* * * * * * *	
	Electro-medical apparatus, and parts thereof:	
	* * * * * * *	
709.17	Other	6% ad val.

From the exhibits and the testimony introduced, it appears that the instrument in question, commonly referred to as a fiberscope, consists of three major parts: a flexible insertion tube, a control unit, and a light guide portion. The tube portion of the instrument, designed to be inserted through the mouth and throat of the individual for the purpose of examining the esophagus, stomach and gastrointestinal areas of the body, consists of six channels: (1) a channel for suction, biopsy and cytology purposes; (2) a channel for visual observation consisting of the lens and a bundle of glass fibers; (3) and (4) channels for light illumination; (5) a channel for water, and (6) a channel for air.

The second portion of the instrument, referred to as a control unit, possesses an angle control mechanism which directs the tip of the fiberscope and also includes a mechanism for the control of air, water and suction, a biopsy port or opening and an eyepiece lens. The third portion of the instrument, a light guide portion, can be attached to a light source and power supply—a separate instrument described as model CLE. The power supply unit, although not a part of the imported merchandise in question, is suitable only for use with the fiberscope and provides the electricity required for the production of light and the operation of the instrument. The medical camera, referred to as FIT, although not a part of the imported merchandise in question, likewise is suitable only for use with the fiberscope. The light which is produced initially in the power supply unit is transmitted through the bundle of glass fibers within the fiberscope providing the

illumination necessary for visual observation as well as the utilization of the other capabilities of the instrument hereinbefore described.

From the expert medical testimony presented at the trial of the within action, all witnesses agreed that the extent of use of the additional capabilities of the instrument in question depended in large part upon the custom and practice in each individual hospital. Although the defendant's medical witness indicated that in the New York Veterans Administration Hospital the use of the biopsy and photographic capabilities of the instrument was not as extensive as elsewhere, the medical testimony of the plaintiff supports the finding that in all instances in which the fiberscope is used for diagnostic purposes by that witness, the biopsy, cytology, suction and photographic capabilities of the instrument in question, are utilized from 80% to 100% of the time it is in operation.

It was further pointed out in the medical testimony presented that whereas the single function of an instrument such as an endoscope permits only a direct observation of the stomach and gastrointestinal areas, the added functions and capabilities of the fiberscope have caused an advancement in medical techniques which previously had been unknown and unavailable and which ultimately will permit further advanced techniques—not only diagnostic but also therapeutic in character.

There can be no dispute that vision is required in the use and operation of the fiberscope. There, likewise, can be no dispute that light provided by an electrical power unit and transmitted through bundles of fibers is required to permit a visual observation as well as the other uses to which the instrument may be applied. The defendant, accordingly, predicates its argument on the premise that without light produced through the bundle of fibers and without the lens and channel through which vision is obtained, the capability to perform a biopsy, cytology, to secure stomach and gastrointestinal secretions through suction and to secure a "documentation" of the stomach area by means of photography would be precluded.

In many of the prior decisions relating to optical instruments, language has been used therein which, although appropriately descriptive and in proper context in the individual case in which it was used, may be inappropriate and misleading when applied to articles involving other and additional characteristics and functions such as found in the case at bar. This court as well as the Court of Customs and Patent Appeals frequently has adopted such definitive terms as "primary," "principal" or "dominant" functions as distinguished from "ancillary," "incidental" or "minor" functions. *Engis Equipment Company* v. *United States*, 62 Cust. Ct. 29, C.D. 3670, 294 F. Supp. 964 (1969);

Parsons Optical Laboratories, Harper, Robinson & Co. v. *United States*, 68 Cust. Ct. 143, C.D. 4351 (1972); *United States* v. *American Machine & Metals, Inc.*, 29 CCPA 137, C.A.D. 183 (1941); *Chas. Kurz Co.* v. *United States*, 57 Cust. Ct. 90, C.D. 2735 (1966). It should not be interpreted that any criticism herein is being directed to these specific decisions or to the use of the language contained in each respective opinion. Suffice it to say, that in the case at bar, this court deems the use of the aforementioned definitive terms as the test for classification purposes to be inappropriate in that they do not truly articulate and reflect the legal justification upon which the determination of the instant action should be made. In attempting to determine which function or capability of the instrument in question is "primary" as distinguished from "ancillary" in view of the testimony presented with respect to its use, indeed, may easily lead one into a never-ending circle.

The Court of Customs and Patent Appeals, speaking through Judge Rich, in the case of *United States* v. *Oxford International Corp.*, 62 CCPA 102, C.A.D. 1154, 517 F. 2d 1374 (1975), has provided a helpful clarification and a meaningful direction with respect to the classification of articles which may possess multiple functions and uses. In reviewing and distinguishing those cases previously decided by that court in which the "more than" doctrine was determined to be applicable, the court summarized its conclusion by stating:

> "Similarly with the other cases cited by appellee, in each there was a second significant function in the importation justifying the application of the 'more than' doctrine." 62 CCPA at 105.

Again, in referring to the application of this doctrine in the case of *United States* v. *Acec Electric Corp.*, 60 CCPA 113, C.A.D. 1091, 474 F. 2d 1009 (1973), the court stated:

> "The clutching function was an addition to the function of the motor in supplying power." 62 CCPA at 106. (See other cases cited therein.)

It would serve no useful purpose to review at length once again the many cases referred to by the Court of Customs and Patent Appeals in its encompassing analysis of the meaning and application of the "more than" doctrine in the *Oxford International, Corp.* decision. This court, applying the test and standard enunciated by our appellate court, thus is confronted with the single question which is deemed to be basically determinative of the issue herein—does the article possess "a second significant function * * * justifying the application of the 'more than' doctrine."

From all of the testimony adduced, it, indeed, appears that the instrument in question not only has an optical function but also has

additional "significant" functions, included among which are the capabilities of performing biopsies, cytologies and photography for documentation purposes. Vision as well as light is of extreme importance and is in most instances a necessity in whatever the human eye and hand may endeavor to perform. Notwithstanding the indispensable character of the functions of this instrument which provides light and visual observation, the additional capabilities and functions thereof are of such "significance" as to require the instrument in question to be held "more than" a medical-optical instrument and appliance.

Having determined that the plaintiff has met its burden of proof that the merchandise in question was not properly classified under item 709.05, TSUS, our consideration is directed to the fact as to whether the instrument in question may be properly classified as an electro-medical apparatus, and parts thereof, under item 709.17, TSUS, as claimed by the plaintiff.

The defendant has devoted a considerable portion of its brief to the contention that the instrument in question was not intended to be included within the purview of item 709.17, TSUS, by virtue of the fact that the superior heading to items 709.05 and 709.17, TSUS, is derived from the heading in section 90.17 of the *Brussels Nomenclature*, 1955. Because of the similarity of language, the defendant further contends that the interpretation of the language in the *Brussels Nomenclature* may be taken as evidence of the meaning intended by the Tariff Commission.

It is the opinion of this court, however, that the pleadings in the within action cause any continued consideration or discussion of the foregoing argument to be unnecessary. Paragraph "Eleventh" of plaintiff's complaint alleges:

> "Eleventh: That if the Court finds that the subject merchandise does not consist of optical instruments or apparatus, or parts thereof, said merchandise is properly provided for within the provisions of Item 709.17, *supra*, as claimed by the plaintiff herein;"

In its answer to plaintiff's complaint, the defendant has admitted plaintiff's foregoing allegation. In view of defendant's admission in the pleadings herein, the plaintiff's burden of proof with respect to its claimed classification has been fully satisfied and is no longer in issue.

Accordingly, the court finds that the merchandise in question properly should be classified as an electro-medical apparatus, and parts thereof, under item 709.17, TSUS, as modified by T.D. 68–9, as claimed by the plaintiff herein.

Let judgment be entered accordingly.

(C.D. 4638)

NEVCO FURNITURE CORP. *v.* UNITED STATES

Furniture

Merchandise invoiced as valets with seats and valet stands was classified under item 727.30 of the tariff schedules as chairs, and assessed with duty at the rate of 15 per centum ad valorem. Plaintiff contended the imported articles were not chairs, but valets designed and used for the specific purpose of holding clothes and articles and, therefore, properly classifiable as furniture of wood, other than chairs under item 727.35 of the schedules, dutiable at the rate of 9 per centum ad valorem. OVERRULED. Plaintiff failed to discharge its dual burden of proof that the merchandise was improperly classified as chairs and that it should have been classified as other than chairs.

CHAIR DEFINED FOR TARIFF PURPOSES

The evidence of record and the applicable law support the classification of the merchandise as chairs. The features which distinguish a chair from other seats is that it is for one person, has a back, a seat raised above the ground, and is used for sitting. See *Decorative Imports* v. *United States*, 43 Cust. Ct. 31, C.D. 2099 (1959). The testimony and exhibits in the present case establish that the importations were designed to support a person in a sitting position and that they were so used. "* * * the noun 'chair' covers a broad gamut of varieties. The fact that the chair * * * is designed and primarily used for a specific purpose does not relieve it of its dominant characteristics so as to remove it from the encompassing category to which it belongs or its common acceptation as a chair. Chairs are frequently named for the purpose for which they are designed. Whatever the designative or descriptive nomenclature applied as indicative of primary purpose and use, the appellation 'chair' still obtains." *Morris Friedman* v. *United States*, 50 CCPA 53, 55, C.A.D. 819 (1963). The addition of the hanger, pants bar, tray attachment and, in some cases, a storage space under the seat, did not change the essential form or character of the merchandise at bar as that of a "chair." See also *Continental Forwarding, Inc.* v. *United States*, 45 Cust. Ct. 312, Abs. 64682 (1960).

COMPETING TARIFF PROVISIONS

In customs cases the proper classification of imported merchandise depends upon the competing tariff provisions. In the case at bar, plaintiff failed to prove that the imported merchandise was "other than chairs."

LEGISLATIVE RATIFICATION OF JUDICIAL INTERPRETATION

Although the authoritative cases defining "chair" for tariff purposes were decided under the Tariff Act of 1930, the language of paragraph 412 of that act is practically identical to that of items 727.30 and

727.35 of the present tariff schedules, and nothing has been shown indicating a change of legislative attitude. Under the doctrine of legislative ratification of the judicial interpretation of a statute reenacted without material change, the decisional law [of the *Decorative Imports*, *Continental Forwarding* and *Morris Friedman* cases] prior to statutory reenactment [of the Tariff Schedules of the United States] continues to be applicable and authoritative. *United States* v. *D. H. Grant & Co., Inc.*, 47 CCPA 20, 27, C.A.D. 723 (1959). See also *Girouard* v. *United States* 328, U.S. 61, 70, 66 S.Ct. 826 (1946) (dissenting opinion of Mr. Chief Justice Stone).

Court Nos. 70/45322, etc.

Port of New York

[Judgment for defendant.]

(Decided February 23, 1976)

Siegel, Mandell & Davidson (*Brian S. Goldstein* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

RE, Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of five models of merchandise described on the invoices as valets with seats and valet stands. The merchandise was classified under item 727.30 of the Tariff Schedules of the United States as:

"Furniture, and parts thereof, not specially provided for:
* * * * * * *
Of wood:
* * * * * * *
Other:
Chairs"

It was, consequently, assessed with duty at the rate of 15 per centum ad valorem.

Plaintiff contests that classification, and claims that the imported articles are not chairs, but valets, designed and used for the specific purpose of holding clothing and articles, and, therefore, are properly classifiable under item 727.35 of the tariff schedules as:

"Furniture, and parts thereof, not specially provided for:
* * * * * * *
Of wood:
* * * * * * *
Other:
* * * * * * *
Furniture other than chairs"

Hence, plaintiff contends that the lawful rate is only 9 per centum ad valorem.

Defendant denies the validity of plaintiff's claim and asserts that the merchandise has been properly classified. It not merely relies upon the presumption of correctness that attaches to the classification of the Customs officials, but has also introduced evidence in support of the classification. Defendant contends that plaintiff has failed to bear its burden of proof, and, as stated in its brief, that the evidence of record and the applicable law, support the classification of the merchandise as "chairs" under item 727.30 of the tariff schedules.

Samples of the controverted merchandise (plaintiff's collective exhibit 1) consist of articles having four legs, a seat, a back, and a removable combination pants bar, utility tray, and coat hanger. Item 652 (exhibit 1D) is of wood with a cane seat; items 669 (exhibit 1C) and 666 (exhibit 1A) have cane backs and cushioned seats; and item 657 (exhibit 1B) has a nonremovable hanger and a storage compartment under the seat.

In addition to plaintiff's illustrative samples, the record consists of two exhibits submitted by plaintiff and two by defendant, as well as the testimony of five witnesses, two for plaintiff and three for defendant. Defendant's exhibits consist of advertisements of valet chairs by Nevco (defendant's collective exhibit A) and Pearl-Wick (defendant's collective exhibit B)—which describe the articles as chairs by day, valets by night. This literature, distributed by plaintiff to the trade, not only refers to the articles as "chairs," but also describes them as "attractive" and "comfortable" chairs. It indicates that the merchandise is represented as having an easily removable combination tray, pants bar, and coat hanger attachments, which, when removed, cause the merchandise to appear indistinguishable from an ordinary chair. Specifically, this promotional material states clearly that the merchandise "converts to a chair by simply removing tray and hanger assembly"; "tray and hanger are easily detached to convert into an attractive chair by day"; and "top of hanger, tray and pants bar are easily detached to give you a comfortable chair by day."

The testimony and an examination of the articles leave no doubt that they were designed to support a person in a sitting position and are, in fact, so used.

Both of plaintiff's witnesses testified that the primary or predominant function of the merchandise was to hang and store clothing and other objects. Plaintiff's first witness, Mr. Nevai, the past president and founder of plaintiff corporation, testified that for about 15 years his company has imported and marketed the valet chairs as items which could "carry, for night, the clothing, neatly." Plaintiff's second witness, Mr. Mullin, agreed with Mr. Nevai and stated that the

special function of the merchandise is the storage of clothes, i.e., "trying to teach neatness and orderliness." Notwithstanding his company's advertisements, Mr. Nevai testified that the merchandise was not made to be sat upon, and that sitting upon it would be very uncomfortable.

On direct examination both of plaintiff's witnesses agreed with the definition that "a chair is for one person, always has a back, and some arrangement which elevates the seat portion above the floor." Although Mr. Mullin testified that the purpose of the merchandise was the storage of clothes, he admitted that it came within the quoted definition of a chair. Mr. Nevai, however, did not believe that the merchandise came within the definition because of the low height of the seat, the weak construction of the back, and the construction of the legs.

The testimony of defendant's three witnesses dealt with their personal ownership and use of the merchandise. Mr. Skrastins, defendant's first witness, testified that he owns a valet chair similar in all material respects to plaintiff's exhibit 1B. He stated that he uses it every workday to hang clothes and to sit when he puts on and takes off his shoes and socks. He previously owned a "valet stand," i.e., a valet without a seat, but purchased the "valet with the seat" because he needed a place to sit, other than on the bed.

Mr. Polansky, defendant's second witness, testified that he owns a model identical to plaintiff's exhibit 1C. He uses it to hang clothing for storage, to sit when he takes off his shoes and socks, to polish his shoes (since he stores his brushes and shoe polish in the valet), and to watch television when he has company. He added that, when seated on the merchandise, he has no fear of leaning back, breaking it or hurting himself.

Defendant's third and last witness, Mr. Babb, stated that he owns a valet chair "essentially the same as shown in Plaintiff's Collective Exhibit 1 in that it contains four legs, a back, a tray at the top portion, a seat and a compartment under the seat." He has owned it for five years and has used it daily to hang clothes, and to store things that he carries in his pocket. He also sits on it while putting on or taking off shoes, socks, pants, or undergarments, and while shining shoes, watching television or just relaxing. In answer to the question "under what circumstances do you use it for sitting," he responded in part: "I have used the article while watching television, which is in my bedroom, and there have been occasions when I've just sat in it and had a discussion with my wife or just rested in it." He added that his wife and two children also sit on it.

At the request of defendant's counsel, the witness, who weighs approximately 185 pounds and is six feet three inches tall, was asked

to select from plaintiff's illustrative samples the article of merchandise that was "similar" or "more similar" to the one owned by the witness. Having selected plaintiff's exhibit 1C, the witness was asked "to actually sit," and "lean back on the back portion" of the merchandise. In answer to the question: "Do you find this chair uncomfortable?", the witness responded: "I find it no more uncomfortable than any straight-backed kitchen chair, for that matter."

It is basic to customs jurisprudence that a presumption of correctness attaches to the classification of the district director of Customs. The applicability and effect of the presumption, now statutory, require no extended discussion. 28 U.S.C. 2635 (1970). Suffice it to say that to overcome this presumption, the plaintiff must bear a dual burden: to prove that the assigned classification is erroneous, and that the claimed classification is correct. See *United States* v. *New York Merchandise Co.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970).

It is to be noted that both of the competing tariff provisions deal with furniture. The question presented, however, is whether plaintiff has succeeded in establishing that they are not "chairs" within item 727.30 of the tariff schedules, but rather, are "other than chairs" under item 727.35 of the schedules. Simply stated, are the valet chairs "chairs," or "other than chairs" for customs duty purposes?

It is the determination of the court that plaintiff has failed to bear its burden of proof that the merchandise was improperly classified as "chairs," and that it should have been classified as "furniture *other than chairs.*" (Emphasis added.)

The question whether imported merchandise is to be classified as "chairs" for tariff purposes is not one of novel impression. This court, in *Decorative Imports* v. *United States*, 43 Cust. Ct. 31, 33, C.D. 2099 (1959), held that:

> "* * * the features which distinguish a chair from other seats are that it is for one person, always has a back, and has some arrangement which elevates the seat portion above the floor or ground so that a person may conveniently sit on it."

The description of a chair was quoted and applied by this court in *Continental Forwarding, Inc.* v. *United States*, 45 Cust. Ct. 312, Abs. 64682 (1960). In the *Continental Forwarding* case the merchandise known as potty chairs, children's training seats or children's folding nursery chairs, had been classified by the Customs officials as "chairs" within the Tariff Act of 1930. Plaintiff claimed that the articles, commonly known as "potty chairs," were not chairs in the tariff sense, and should have been classified as furniture, other than chairs. It was agreed that the articles were "used primarily for the training of small children." It was also clear that the importations had "a seat

which may be placed over the opening and the article used for ordinary seating purposes."

Plaintiff contended that the potty chair "is something more than a seat, but is a commode or toilet facility." In support of its contention it cited the "principle that when special features are incorporated in the construction of an imported article to fit it for multiple uses, the article is no longer encompassed by a statutory provision which would have provided for the article were it not for the special features." 45 Cust. Ct. at 313.

It is significant that plaintiff's contention that the "potty chairs" were not chairs was explicitly set forth and considered by the court. The court summarized plaintiff's argument as follows:

> "In essence, then, plaintiff's argument is that when an article which is in form a chair has a primary use other than that of merely being a seat, it cannot be considered a chair—at least, for tariff purposes." *Ibid.*

The statement of plaintiff's position was categorically denied with the following words: "With this argument, we cannot agree * * *."

The court quoted from the description of a chair, as found in the *Decorative Imports* case and stated:

> "It would seem that it is a feature of every chair that one may sit on it, but this is not to say that mere sitting is the primary purpose of every chair. As pointed out in the definition of the noun 'chair,' in Funk & Wagnalls New Standard Dictionary, 1942, chairs are frequently named for the purpose for which they were designed—dentists' and barbers' chairs being cited as examples. In the case of such chairs, the fact that one is seated is merely incidental to the primary purpose of having dental or tonsorial work performed." 45 Cust. Ct. at 313.

The court noted that "the analogy [of the dentists' and barbers' chairs] carries over sufficiently to the articles in the case at bar [the potty chairs] to fix their character as chairs." Significantly, the court added:

> "The fact that their primary purpose is to train children and that it is only incidental to such training that the trainee is seated thereon does not, in our view, require that they be considered as *other than chairs.*" (Emphasis added.) 45 Cust. Ct. at 313–14.

The court's view of the classification of the potty chairs is worthy of repetition:

> "The article at bar is in form a chair and has the use of a chair, viz, to be sat upon. The fact that while the occupant is seated something else is done does not cause it to lose its status as a chair and endow it with such a name or character as compels it to be regarded as an article entirely different from a chair." 45 Cust. Ct. at 314.

The conclusion of the court, in the *Continental Forwarding* case, is particularly applicable here. In referring to the many different forms of chairs, and the *eo nomine* principle of customs law, the court stated:

> "In our view, the term 'chair' is one covering a great many different forms of the article. The article at bar is one of those forms, and, if any rule of classification is controlling in the matter, it is that an *eo nomine* statutory designation of an article, without limitations or a shown contrary legislative intent, judicial decision, or administrative practice to the contrary, and without proof of commercial designation, will include all forms of the article. *Nootka Packing Co. et al.* v. *United States*, 22 C.C.P.A. (Customs) 464, 470, T.D. 47464. None of the exceptions to the rule have been made apparent here." 45 Cust. Ct. at 314.

Consequently, after specifically considering the "more than" doctrine of customs law, the court nevertheless sustained the classification of the potty chairs under the *eo nomine* designation as chairs, and overruled the claim that they were furniture, other than chairs.

In the case at bar, plaintiff claims that the valet chairs should not have been classified as "chairs" but rather as "furniture other than chairs." It cannot be doubted that the *Continental Forwarding* case supports the customs classification and is authority to the contrary. Notwithstanding the "primary purpose" of the merchandise, the potty chairs came within the broad category of "chairs." Furthermore, the promotional materials in that case referred to the merchandise as chairs, thereby refuting the importer's claim that it was furniture, *other than chairs*. The same, of course, may be said in the case at bar because the evidence here is irrefutable that the valet chairs also are offered to the public as chairs.

The issues presented in the *Continental Forwarding* case were again presented and decided in the case of *Morris Friedman* v. *United States*, 48 Cust. Ct. 373, Abs. 66579 (1962), *aff'd* 50 CCPA 53, C.A.D. 819 (1963), which also dealt with potty chairs. The trial court described the merchandise as "[c]hairs in all material respects similar to those" in the *Continental Forwarding* case "except that the chairs in the *Continental* case had a lid [or cover], which might be placed over the opening, thus allowing the article to be used for ordinary seating purposes." 48 Cust. Ct. at 374. Since the potty chairs in the *Morris Friedman* case did not have a lid, the importer attempted to distinguish them from those in the *Continental Forwarding* case, and, among other things, indicated that they were "uncomfortable and probably not sat upon by choice."

In sustaining the classification of the merchandise as chairs, this court stated that it found "no reason for departing from the rule of our decision in the *Continental* case." The court decided that none of

the reasons urged by the importer had "anything to do with the fact of whether an article is or is not a chair" and stated:

> "Location, reason for use, state of dress of the user, and degree of comfort while using do not add to or detract from the character of an article as a chair, and, in the case of the articles before us, the presence or absence of a lid covering the opening in the seat is similarly inconsequential. It is clear that the decision in the *Continental* case was not based upon the occasional use of the article with the lid down, but upon its primary use, which is the use of the articles before us." *Ibid.*

In affirming the judgment of the trial court, and sustaining the classification of the merchandise as chairs, the Court of Customs and Patent Appeals quoted extensively from the *Continental Forwarding* case and expressly adopted its reasoning. The following statements from the opinion of the Court of Customs and Patent Appeals in the *Morris Friedman* case represent an authoritative restatement of the law on the dutiable status of chairs:

> "We think the reasoning of the court in the *Continental Forwarding* case * * * is applicable to the instant case. It is a matter of common knowledge that the noun 'chair' covers a broad gamut of varieties. The fact that the chair at bar is designed and primarily used for a specific purpose does not relieve it of its dominant characteristics so as to remove it from the encompassing category to which it belongs or its common acceptation as a chair. Chairs are frequently named for the purpose for which they are designed. Whatever the designative or descriptive nomenclature applied as indicative of primary purpose and use, the appellation 'chair' still obtains." 50 CCPA at 55.

The appellate court agreed, and quoted extensively from the opinion of the Customs Court that the absence of a cover or lid did not render the reasoning of the *Continental Forwarding* case inapplicable.

These decisions declare with authority that "the noun 'chair' covers a broad gamut of varieties"; further, that a chair is for one person, has a back, a seat raised above the ground, and is used for sitting. If imported merchandise is in the form of a chair, it is classifiable under the *eo nomine* provision for "chairs," and not as "furniture other than chairs." Furthermore, if the merchandise is in the form or configuration of a chair, the cases show that it is of no consequence that it is also used for a purpose in addition to that of sitting.

When applied to the valet chairs at bar the judicial authority discussed leads to the conclusion that, regardless of the change or modification brought about by the addition of an easily removable combination hanger, pants bar, tray attachment,* and in some articles,

*Defendant, in its post-trial brief, points out that the merchandise in the *Morris Friedman* case likewise had "easily detachable trays similar to and adaptable for the same purpose as the trays which form part of children's high chairs." 50 CCPA at 54.

a storage space under the seat, the essential form or character of the merchandise is still that of a chair. If the merchandise has the physical attributes of a chair, is recognizable as a chair, and is in fact used for sitting, it is dutiable as a chair. The cases also show that additional factors such as height of the seat from the floor, nature of construction and comfort, do not alter its classification for tariff duty purposes.

Plaintiff, in its post-trial brief, concisely summarizes its argument in two point headings. It asserts that "the merchandise in issue is not classifiable within the *eo nomine* provision for chairs," and that "the merchandise in issue is more than a chair." Whether merchandise is to be classified under an *eo nomine* designation of the tariff schedules, or whether the *more than* doctrine of customs law requires a different classification, are questions common to many customs classification cases. The doctrines are well known and have been applied in many cases. See cases cited in *United Carr Fastener Corp.* v. *United States* (*Northern Screw Corp., Party in Interest*), 54 CCPA 89, C.A.D. 913 (1967) and *Robert Bosch Corp. et al.* v. *United States*, 63 Cust. Ct. 96, C.D. 3881 (1969). As indicated by Judge Almond, however, "* * * each case must in the final analysis be determined on its own facts." *E. Green & Son* (*New York*), *Inc.* v. *United States*, 59 CCPA 31, 34, C.A.D. 1032, 450 F. 2d 1396 (1971).

In customs classification cases it is crucial to determine the competing tariff provisions. The proper classification of imported merchandise often depends upon the specific language of the pertinent provisions. Therefore, the question presented is not simply, as phrased by plaintiff, that the valet chair is "more than a chair." The question, rather, is whether the valet chairs are "other than chairs" and, therefore, classifiable under the claimed provision for furniture. Since both competing tariff provisions deal with furniture, it seems clear that the more appropriate tariff provision is the one that describes the item more specifically. See General Interpretative Rule 10(c) and authorities cited in *W & J Sloane, Inc.* v. *United States*, 76 Cust. Ct. 62, C.D. 4636 (1976).

Since the *Decorative Imports*, *Continental Forwarding* and *Morris Friedman* cases are authority contrary to the position urged by plaintiff, it should be indicated that they were decided under paragraph 412 of the Tariff Act of 1930. It is important to note, however, that the language of that provision is practically identical to that of items 727.30 and 727.35 of the present tariff schedules. Nothing has been shown or has been found that would indicate a change of legislative attitude. Under the doctrine of legislative ratification of the judicial interpretation of a statute reenacted without material change, the decisional law prior to statutory reenactment continues to be applicable and authoritative. *United States* v. *D. H. Grant & Co., Inc.*,

47 CCPA 20, 27, C.A.D. 723 (1959); *Sears, Roebuck and Co.* v. *United States*, 46 CCPA 79, 83, C.A.D. 701 (1959). See also dissenting opinion of Mr. Chief Justice Stone in *Girouard* v. *United States*, 328 U.S. 61, 70, 66 S.Ct. 826 (1946). Hence, the decisional law governing the classification of "chairs" under the Tariff Act of 1930 is equally applicable to the dutiable status of "chairs" under the Tariff Schedules of the United States.

Defendant, in its brief, suggests an additional reason in support of the classification. It points out that Congress, in item 727.35 of the tariff schedules, has specifically described the merchandise embraced thereunder as "furniture *other than chairs*" (emphasis added). There is merit to the suggestion that the terminology, which is unlike other tariff provisions where merely the word "other" is used, was intended to indicate that merchandise, which, because of its shape, structure or form, came within the description of a "chair," was not to be classified under the provision for "furniture, other than chairs."

Based upon the evidence of record, it is the determination of the court that plaintiff has failed to bear its burden of proof that the valet chairs at bar have been incorrectly classified, and that they should have been classified under item 727.35 as "furniture other than chairs."

The record, and the applicable decisions of this court and the Court of Customs and Patent Appeals, support the classification of the merchandise as "chairs" under item 727.30 of the Tariff Schedules of the United States.

In view of the foregoing, the protests are overruled and the classification of the Customs officials is sustained.

Judgment will issue accordingly.

(C.D. 4639)

MATTEL, INC. *v.* UNITED STATES

Parts of toys—Phonographs

Articles invoiced as "voice units," which are inserted into dolls and other objects to reproduce prerecorded sentences or sayings, were classified by the government under item 737.90, TSUS, as parts of toys. Plaintiff contends that the articles are properly classifiable under item 685.32. *Held:* The imported articles were properly classified as parts of toys.

THE IMPORTED VOICE UNITS ARE MORE THAN PHONOGRAPHS

Each imported "voice unit" has a permanently affixed interleaved record which does not provide merely an auxiliary or incidental function but is at least of equal importance to the sound

reproducing or phonographic portion of the article. Accordingly, the imported article is not just another version or model of a phonograph but is rather a new and distinct commercial entity containing the elements of both a phonograph and a record. Thus this new entity is something more than as well as other than the phonographs encompassed by item 685.32.

Court Nos. 70/42525, etc.

Port of Los Angeles

[Judgment for defendant.]

(Decided March 8, 1976)

Musgrave, Welbourn & Fertman (*Leonard M. Fertman* and *R. Kenton Musgrave* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Michael S. O'Rourke* and *Saul Davis*, trial attorneys), for the defendant.

MALETZ, Judge: The question involved in this consolidated action is the proper tariff classification of articles invoiced as "voice units" that were imported from Mexico in 1968 and 1969.

The importations were classified by the government under item 737.90 of the Tariff Schedules of the United States, as modified by T.D. 68-9, as parts of toys, not specially provided for, and assessed with duty at the rate of 31 percent or 28 percent ad valorem, depending upon the date of entry.

Plaintiff contends that the articles are properly classifiable under item 685.32 of the tariff schedules, as modified by T.D. 68-9, as phonographs, dutiable at the rate of 10 percent or 9 percent ad valorem, depending upon the date of entry.

The provisions of the tariff schedules with which we are concerned read as follows:

General Headnotes and Rules of Interpretation

10. General Interpretative Rules. * * *

* * * * * * *

(ij) a provision for "parts" of an article covers a product solely or chiefly used as a part of such article, but does not prevail over a specific provision for such part. [Emphasis added.]

Schedule 7, Part 5

Subpart E. – Models; Dolls, Toys, Tricks, Party Favors

Subpart E headnotes:

1. The articles described in the provisions of this subpart (except parts) shall be classified

in such provisions, whether or not such articles are more specifically provided for elsewhere in the tariff schedules * * *. [Emphasis added.]

Classified under [Schedule 7, Part 5, Subpart E]:

	Toys, and parts of toys, not specially provided for:	
	* * * * * * *	
737.90	Other	31% or 28% ad val. [as modified by T.D. 68–9]

Claimed under [Schedule 6, Part 5]:

685.32	Record players, phonographs, record changers, turn-tables, and tone arms, and parts of the foregoing	10% or 9% ad val. [as modified by T.D. 68–9]

The parties agree that the voice units in question are parts of toys; that in their condition as imported they have no independent play or amusement value; and that they are not used in their condition as imported. Rather, at plaintiff's factory in the United States, they are inserted into dolls, stuffed animals and other objects manufactured by plaintiff.[1] Further, it is undisputed—and the court agrees—that the provision for phonographs in item 685.32 is a specific provision within the meaning of general interpretative rule 10(ij). Thus, if the imported articles are phonographs within the ambit of item 685.32, as claimed, then general interpretative rule 10(ij) and headnote 1 of schedule 7, part 5, subpart E require that this phonograph provision prevail over the item 737.90 "parts of toys" provision. In these circumstances, the single issue is whether or not the importations constitute "phonographs" within the common meaning of item 685.32.

The imported article, which is patented, comes enclosed in a plastic casing which has an eyelet in the side of the housing.[2] It has a turntable, spindle, tone arm assembly, stylus or needle, loudspeaker cone, a clock spring that serves as a driving spring, and a drawstring which is wrapped around a pulley that is attached to the clock spring. The drawstring extends through the tone arm assembly and through the

[1] The specific articles here in issue are invoiced variously as "Baby Whisper Voice Unit," "Tom and Jerry Voice Unit," "Gas Station Voice Unit," "Kiddee House Voice Unit," "Spanish Drowsy Voice Unit," and "Mrs. Beasley Voice Unit."

[2] Representative samples of the imported article are contained in the record as plaintiff's exhibits 1 and 1A.

eyelet to the exterior of the casing where the other end is attached to a plastic ring.

The device also contains a disc or record which is permanently affixed by glue or cement to the turntable and cannot be removed without destroying the article. The unit is operated in the following manner, as described by its inventor (R. 36):

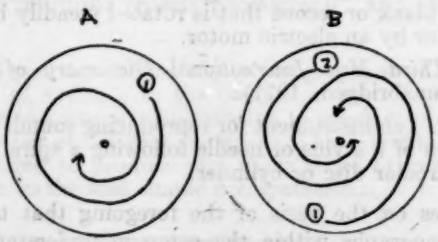
> When you pull the string it winds up a spring; when you release the string, the spring turns a turntable. There's a record on the turntable, and the record is played by a stylus or phonograph needle which is in a tone arm. The vibrations on the record are reproduced by the needle moving and pressing against the loud speaker cone. The loud speaker cone transmits the sound into the air.

The record, however, differs from the "conventional" monophonic or stereophonic record. For the conventional record has but one continuous spiral groove or sound track radiating inward to the center, whereas the record in the imported voice unit contains several interleaved sound tracks on the surface. These tracks consist of continuous spiral grooves which start at different points on the circumference and run on nearly parallel paths into the center of the record. Put otherwise, a conventional record has but one spiral groove while an interleaved record has two or more spiral grooves in the same record.[3]

Each spiral in the imported voice unit contains a separate and distinct prerecorded sentence or saying which generally runs from two to three, but not more than four seconds. The records affixed to these units have between eleven and thirteen of such prerecorded statements, thus containing about forty seconds of recorded material.

The imported device is designed and constructed so that the record cannot be played sequentially. When the string which starts the mechanism is pulled, the stylus will fall in a random fashion into any one of the spiral grooves or sound tracks and play only that prerecorded sound which, as noted, runs no longer than four seconds. Thus,

[3] Following are illustrations of the spiral grooves contained in the "conventional" and "interleaved" records which are designated "A" and "B" respectively:



an essential characteristic of the article is that the operator can neither control nor determine in advance which sound track will be played. In other words, as the parties stipulated, the article is a "random selection device."

Turning now to the legal aspects, it is fundamental that absent contrary legislative intent, the common meaning of a term controls in construing the tariff statutes. "And this common meaning is, of course, 'a matter of law to be determined by the court, for which purpose the court may consult dictionaries and other authorities, may receive the testimony of witnesses, which is advisory only, and may rely on its own knowledge'." *Mattel, Inc.* v. *United States*, 65 Cust. Ct. 616, 619, C.D. 4147 (1970). See also e.g., *United States* v. *O. Brager-Larsen*, 36 CCPA 1, 3, C.A.D. 388 (1948); *West Coast Cycle Supply Co.* v. *United States*, 66 Cust. Ct. 500, 503, C.D. 4242 (1971).

Against this background, plaintiff called as expert witnesses the inventor of the voice units, who is an electrical engineer; a patent lawyer and engineer with over 30 years of experience in the sound equipment and electronics fields; a manager of technical operations for a company which provides consulting and engineering services to its clients in the magnetic recording and sound reproduction businesses; and a professor of mechanical engineering who is a specialist in mechanical design in vibration and the author of a widely used text on vibration. They testified to the effect that the product in question has all the elements of a phonograph, i.e., a stylus, tone arm, spindle, turntable, drive mechanism and speaker, and is an acoustical phonograph regardless of the random selection feature of the device and the permanence and tonal quality of the records.

In addition, all these witnesses testified that in their expert opinion the merchandise at issue falls within the following dictionary definitions of the word "phonograph":

> *Webster's New International Dictionary of the English Language* (unabridged, 1958):
>
> 3. An instrument for recording, for reproducing, or for recording and reproducing sounds by the transmission of the vibrations of a stylus connected with a diaphragm and in contact with a groove in a record blank or record that is rotated steadily by the action of a spring or by an electric motor.
>
> *Webster's Third New International Dictionary of the English Language* (unabridged, 1971):
>
> phonograph: an instrument for reproducing sounds by means of the vibration of a stylus or needle following a spiral groove on a revolving circular disc or cylinder.

Plaintiff argues on the basis of the foregoing that the imported articles are phonographs within the common understanding of the

term and within the meaning of the tariff schedules. It further states that an examination of the sample confirms that the imported merchandise contains all of the elements of a phonograph as that term is commonly used since it has a stylus or needle attached to a tone arm, a mechanically activated drive mechanism and a loudspeaker cone.

Defendant, on the other hand, while conceding that the article has the "minimal elements" of an acoustical phonograph, argues that the incorporation of a permanently affixed record in the unit makes the importation something other than a phonograph within the intendment of item 685.32. Defendant also contends that the separate provision for phonograph records in item 724.25 is indicative of a Congressional intent to exclude a phonograph-record "combination" article, as the defendant characterizes the imported merchandise, from a mere "phonograph."

As we have seen, *Webster's Third New International Dictionary* (1971) defines a phonograph as "an instrument for reproducing sounds by means of the vibration of a stylus or needle following a spiral groove on a revolving circular disc or cylinder." [4]

In addition to the dictionaries, helpful also in ascertaining the common meaning of the term "phonograph" are *Louis Wolf & Co., Bing Wolf Corp.* v. *United States*, 19 CCPA 132, T.D. 45258 (1931) and *E. H. Scott Radio Laboratories, Inc.* v. *United States*, 6 Cust. Ct. 1, C.D. 410 (1940). In *Wolf* the appellate court held that an article comprised of a horn, disk, needle holder, spring, governor and all the other essential parts required to make it play records under six inches in diameter, and which came enclosed in a metal box, was a phonograph, albeit of cheap, flimsy construction, since (among other things) it was capable of playing and did play the complete records provided for it. 19 CCPA at 134. And in *Scott* the court stated that the term "phonograph" referred to "apparatus for reproducing, either by mechanical or electrical means, sounds recorded on plates of wax or other material." 6 Cust. Ct. at 3.

It is also to be noted that the patent on the imported device (plaintiff's exhibit 2), which was issued on January 16, 1962, describes the article as a "multiple speech phonograph" and states (column 1, lines 7–22):

> This invention relates to a phonograph or phonograph device, by way of example in the form of a toy which is operative in response to a simple manipulation to speak or pronounce any one of a number of different sentences. The device may of course also be arranged to produce any other series or group of sounds in response to the said simple manipulation.

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[4] The 1968 edition of *Webster's* contains an identical definition.

> An illustrative example of the adaptation or utilization of the invention is that it may be embodied in a doll and then a child by a simple manipulation such as, for example, the pulling of a drawstring may cause the doll to speak or pronounce a number of different sentences. A feature of the device is that the record used has a plurality of spaced spiral grooves which are separate in a sense that each reproduces a separate and distinct sentence or other distinctive sound.

With these considerations in mind, the court finds that since the imported merchandise contains a turntable, spindle, tone arm, stylus, loudspeaker cone and drive assembly, and is capable of playing a record, it has all the essential features of what is commonly known as a phonograph. And considering that an *eo nomine* provision, such as item 685.32, embraces all forms of the article, e.g., *Nootka Packing Co.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935), including those of inferior quality or lacking in refinements, *Louis Wolf & Co. et al.* v. *United States*, *supra*, 19 CCPA at 134, the classification issue would be resolved in plaintiff's favor if the article contained only the phonograph components. But it does not.

For the article also includes, as an essential element, a permanently affixed interleaved record which, in the words of the patent (plaintiff's exhibit 2, column 3, lines 8–19)—

> * * * in itself is unique and it is unique in its cooperation with the other parts of the phonograph. It has a plurality of individual interleaving spiral grooves as may be seen in FIGURE 4, each of which is a separate sound track on which is recorded a distinctive sound, for example a distinctive complete sentence.
>
> As will be explained more in detail hereinafter, the device possesses the quality of randomness of operation in that upon each operation the needle may engage any one of the various grooves randomly so that the sound that is reproduced cannot be anticipated. This is an intentional objective of the invention. * * *

The patent further states (column 6, lines 64–74):

> From the foregoing, those skilled in the art will observe that the invention embraces the fascinating concept of providing a device which will figuratively speak for itself and is adapted to speak or say things which the operator is not able to anticipate, at least not exactly. The invention embraces the concept of a device which a child for example may speak to and then receive a response from, which response is, in effect, chosen and selected by the device itself since the operator does not know which of the sound tracks or spiral grooves on the record will be engaged by the needle.

Based on the court's own observation and operation of a representative sample (plaintiff's exhibit 1A), there is no doubt that the foregoing patent claims accurately describe the imported article. Further,

it is evident that the permanently affixed interleaved record does not provide merely an auxiliary or incidental function which facilitates the primary purpose of the article.[5] To the contrary, the interleaved record—which is the sound source in a device that will "figuratively speak for itself and is adapted to speak or say things" in a particular manner—is at least of equal importance as the sound reproducing or phonograph portion contained therein. Indeed, it would seem to be the heart of the device.

Accordingly, it must be concluded that the article in controversy is not just another version or model of a phonograph. It is rather a new and distinct commercial entity containing the elements of both a phonograph and a record which, by reason of their special design and permanent attachment, have merged into a single unit possessing certain unusual, if not unique, features. Consequently, this new entity is something more than as well as other than the phonographs encompassed by item 685.32 and is not classifiable thereunder. See e.g., *United States* v. *A. W. Fenton Co.*, 49 CCPA 45, C.A.D. 794 (1962); *United States* v. *New York Merchandise Co.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *United States* v. *Acec Electric Corp.*, 60 CCPA 113, C.A.D. 1091, 474 F. 2d 1009 (1973); *United States* v. *Howard Hartry, Inc.*, 60 CCPA 140, C.A.D. 1099, 477 F. 2d 1400 (1973). As our appellate court recently reiterated, merchandise which in fact constitutes more than a particular article is not classifiable as that article. *Pollard Bearings Corp.* v. *United States*, 62 CCPA 61, 64, C.A.D. 1146, 511 F. 2d 568, 571 (1975). See also e.g., *United States* v. *Flex Track Equipment Ltd.*, 59 CCPA 97, C.A.D. 1046, 458 F. 2d 148 (1972); Sturm, *A Manual of Customs Law* (1974) pp. 298–300.

Finally, plaintiff contends that in determining the tariff classification of the imported article the court should give probative weight to the fact that the United States Patent Office issued the patent on the article as a "Multiple Speech Phonograph" under class 274–14 which covers "sound recording and reproducing" with a "stylus feed restoring" characteristic. I cannot agree. For one thing, the patent classification of articles depends upon the manner in which *the applicant* words his claims. Further, the Patent Office's system of classification is one instituted for the convenience of the patent examiners. In short, there is no correlation whatever between the manner in which patents are classifiable by the Patent Office and the manner in

[5] Under the tariff acts, "articles are classifiable on the basis of their primary design, construction and function, even though they are capable of performing other auxiliary or incidental operations." *Schick X-Ray Co., Inc.* v. *United States*, 64 Cust. Ct. 430, 435, C.D. 4013 (1970). See also e.g., *United States* v. *Oxford International Corp.*, 62 CCPA 101, C.A.D. 1154, 517 F. 2d 1374 (1975); *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973); *United Carr Fastener Corp.* v. *United States*, 54 CCPA 89, C.A.D. 913 (1967).

which merchandise is classifiable under the provisions of the Tariff Schedules of the United States.

For the foregoing reasons, it is concluded that the articles in issue were properly classified as parts of toys, not specially provided for, under item 737.90. Plaintiff's claim is overruled and judgment will be entered accordingly.

(C.D. 4640)

INTERNATIONAL FASHIONS *v.* UNITED STATES

Ladies' knitwear

EXPORT VALUE—INSPECTION COMMISSION—SEPARABILITY PRECLUDED

Ladies' acrylic knitted sweaters and boucle capes exported from Hong Kong in August, 1971, were appraised on the basis of export value as defined in 19 U.S.C.A. § 1401a(b) at invoiced unit values plus 5%, and the importer contends that the proper export values are represented by the invoiced unit values.

Evidence in the record shows that although the appraiser accepted the invoice unit prices as his starting point in making the appraisement he added 5% to reflect what a customs agency report indicated was an additional 5% paid as an inspection fee but not shown in the invoices. Testimony given by the importer's owner and president indicated that the 5% was paid for inspection services performed by the manufacturer's managing director before the merchandise was in a condition, packed ready for exportation to the United States. And the only evidence relating to sales or offers concerning merchandise other than that imported herein is a statement in the affidavit of the manufacturer's said managing director to the effect that during 1971 prices charged by the factory were the same for comparable merchandise to all importers who purchased from the factory.

Held, application of the separability principle is precluded because there is no evidence that the prerequisite sales or offers of such merchandise were made for exportation to the United States at the claimed invoice unit prices.

Court No. 74-10-02730

Port of Los Angeles

[Dismissed.]

(Decided March 17, 1976)

Glad, Tuttle & White (*Edward N. Glad* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of ladies' acrylic knitted sweaters and boucle capes which were manu-

factured in Hong Kong, exported therefrom in August, 1971, and entered at the port of Los Angeles, California. In issue here is the proper appraised export value as that value is defined in 19 U.S.C.A., section 1401a(b)* (section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956).

Plaintiff contends in this action that the proper export values are the f.o.b. invoice unit values, net packed, without the addition of 5 per cent as reflected in the appraiser's return of value. The record shows that the 5 per cent was added in the appraisement upon the advice of a customs agency report which indicated that there was an additional 5 per cent paid as an inspection fee that was not shown in the invoices. But it appears that the appraiser did accept the invoice unit values as the starting point in making the appraisement in issue.

Plaintiff acknowledges the payment of an additional 5 per cent in connection with the purchase and exportation of the involved merchandise, but alleges that the payment represents a commission that was paid for an inspection performed after the merchandise was in a condition packed ready for shipment to the United States [complaint, paragraph 7]. However, the evidence in the case, while it indicates that the disputed payment was initiated by the plaintiff, also indicates that the payment was for inspection services performed before the merchandise was in a condition packed ready for exportation to the United States.

The services for which the 5 per cent payment was made was described in the testimony of William Feldstein, Jr., plaintiff's owner and president since 1967. Mr. Feldstein testified on direct examination (R. 21–23):

> Q. I would like to refer you to the entries in this particular case and ask you if you are familiar with these importations?—A. I am.
>
> Q. How are you familiar with these importations?—A. They pertain to merchandise which I ordered and also pertain to order numbers which belong to my firm and relative letters of credit issued and guaranteed by me individually.
>
> Q. From what manufacturer were these items of wearing apparel purchased?—A. Sincere's Knitting Factory.
>
> Q. Did you have anybody making 100 percent inspection of these garments?—A. Yes.

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*Section 1401a(b) states:

For the purposes of this section, the export value of imported merchandise shall be the price, at the time of exportation to the United States of the merchandise undergoing appraisement, at which such or similar merchandise is freely sold or, in the absence of sales, offered for sale in the principal markets of the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for exportation to the United States, plus, when not included in such price, the cost of all containers and coverings of whatever nature and all other expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States.

Q. Whom did you have make 100 percent inspection of these garments?—A. A gentleman by the name of Mr. James Cheung.

Q. What arrangement did you have with Mr. James Cheung?—A. My arrangement with Mr. James Cheung was as follows: after I ordered the merchandise I asked him to inspect all of my yarns to make sure that I was not receiving uneven yarn from the finisher who I contracted for the yarn. After the pieces were knitted I asked that he inspect all the knitted bundles to make sure that the amount of yarn that was sent to the knitters came back into the knitted piece and that I was receiving precisely what I wanted. After that he supervised a team of people to inspect all the knitted pieces to make sure that the various sizes and specifications that I had required were proper prior to the time the garments were finished. And in conclusion, or at the conclusion of these particular orders he would, not "would," but he did inspect the merchandise in its entirety.

Q. How did you pay for this merchandise?—A. I paid for the merchandise through letter of credit.

And it was also brought out in the direct testimony of the witness that the letters of credit issued to Sincere's Knitting Factory and received in evidence as collective exhibit 1 were required to be cashed, among other things, against an inspection certificate signed by Mr. Cheung.

Payment for the inspection services was made separate and apart from payment for the merchandise *per se*. In this connection the affidavit of James Cheung, managing director of Sincere's Knitting Factory, Kowloon, Hong Kong, dated March 13, 1975, and received in evidence as exhibit 2, states:

> That my firm was paid by Letters of Credit made out to Sincere's Knitting Factory for the merchandise it sold to International Fashions. However, the payment to me of the 5% commission for the 100% inspection was made by checks in response to separate debit notes which I submitted every six to nine months to International Fashion, a photostatic copy of my last debit note to International Fashion with the check received by me in payment, along with the receipt, are attached hereto. I only did this 100% inspection for International Fashion.
>
> That I never considered the 5% commission payments from International Fashion as part of Sincere's Knitting Factory's profit. These payments were never made a part of Sincere's Knitting Factory's record. These payments were used by me to pay the persons that I had to hire to do this 100% inspection. In addition, I and not the factory signed the inspection certificates.

The Cheung affidavit also avers, among other things, that the factory employed around 250 workers and sold to buyers in the United States, Canada, Australia, and Europe, and that during 1971 prices charged by the factory were the same for comparable merchandise to all importers who purchased from the factory.

In its brief plaintiff argues that the appraisement is separable so as to permit challenge of only the inspection fee; and that since this fee is in the nature of a buying commission, it is not part of the dutiable value. Defendant argues that the appraisement is not separable, but that even if it is separable the separability doctrine is not available since plaintiff failed to prove that the merchandise was freely sold or offered for sale to all purchasers for exportation to the United States at prices which did not include the disputed fee. Defendant also argues that plaintiff failed to establish that the disputed charge is not part of the price of the merchandise.

Although the doctrine of separability extends to cases such as that at bar where the appraisement involves an f.o.b. price rather than an ex-factory price, see *United States* v. *Knit Wits (Wiley) et al.*, 62 Cust. Ct. 1008, A.R.D. 251, 296 F. Supp. 949 (1969), the application of the doctrine is conditioned upon a showing that the merchandise is freely sold or offered for sale to all purchasers for exportation to the United States at a price which does not include the disputed item or items. *United States* v. *Pan American Import Corp. et al.*, 57 CCPA 134 C.A.D. 993, 428 F.2d 848 (1970). Bearing in mind that the imported merchandise in this case involves "quality controlled" knitwear, the only evidence in the record as to prices for merchandise other than that imported herein is the aforementioned statement in the Cheung affidavit. And the court agrees with defendant that this statement does not constitute evidence of statutory export value equal to invoice unit prices which do not include inspection charges, or without a separate payment for inspection charges.

In fact, if the term "comparable merchandise" in the Cheung affidavit can be said to be the equivalent of the quality controlled knitwear involved in this case, it would appear, according to the Cheung affidavit, that other sales of such merchandise involved an additional inspection charge. In this connection the Cheung affidavit states:

> That Sincere's Knitting Factory had its own inspectors in the packing and finishing department who would random inspect the merchandise being shipped to all of its customers, including International Fashions. But then I would have these six to twelve persons do the 100% inspection which is *similar to the inspection that the agents of my other customers would do.* [Emphasis added.]

And again the Cheung affidavit states:

> That when these inspectors [the Cheung appointed inspectors] found any defects in the merchandise, they would return the defective garment to the factory to either be fixed or replaced *in the same manner that agents for our other customers would do.* [Emphasis added.]

Hence, under the circumstances disclosed in this case, the absence of evidence of other sales or offers of such merchandise, i.e., "quality

controlled" knitwear, at prices other than the appraised values, bars application of the separability principle here.

Moreover, even if plaintiff had established the requisite export sales or offers, paving the way for application of the separability principle in this case, the testimony of the witness Feldstein noted hereinbefore would preclude any treatment of the disputed charge, irrespective of to whom paid, as nondutiable. Section 1401a(b) plainly includes expenses incidental to placing the merchandise in condition, packed ready for shipment to the United States, when not included in the price *per se*. And the services outlined in the Feldstein testimony for which the disputed charge was incurred clearly fall within this category. As such, the court would be obliged in any event to sustain defendant's alternative argument, to wit, that plaintiff has failed to establish the non-dutiability of the charge.

Nor is plaintiff's case saved by calling the charge in question a buying commission as counsel seem inclined to do in their brief. Apart from the fact that plaintiff's posture in its pleading precludes designation of the disputed item as anything but an inspection commission, a buying commission is different from, and, therefore, incompatible with the charge under consideration in this case. A buying commission is associated with and affects the *manner* in which foreign merchandise is purchased for exportation, whereas the inspection commission at bar is associated with and affects the *nature* of the foreign merchandise which is purchased for exportation, i.e., the presence or absence of the charge determines whether the foreign merchandise is "quality controlled" merchandise, or whether it is non-quality controlled merchandise.

For the reasons stated plaintiff has failed to sustain the issuable allegations of the complaint. Accordingly, the court finds as facts:

1. That the merchandise in this action consists of "quality controlled" ladies' acrylic knitted sweaters and boucle capes manufactured in Hong Kong by Sincere's Knitting Factory and exported therefrom in August, 1971.

2. That said merchandise was appraised upon entry at the port of Los Angeles, California, on the basis of export value as defined in 19 U.S.C.A., section 1401a(b) (section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) at the invoiced f.o.b. unit prices plus 5 per cent.

3. That there is no evidence in the record that at the time of exportation of said merchandise such or similar merchandise was freely sold or, in the absence of sales, offered for sale to all purchasers in the principal markets of Hong Kong in the usual wholesale quantities for exportation to the United States at the invoiced f.o.b. unit prices.

Upon these facts the court concludes as matters of law:

1. That export value as defined in 19 U.S.C.A., section 1401a(b) (section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) is the proper basis for determination of the value of the merchandise herein.

2. That plaintiff has not established an export value different from that returned in the appraisement of said merchandise.

3. That the appraised values of said merchandise remain in full force and effect by reason of plaintiff's failure to overcome the presumption of correctness attaching to the appraisement.

Judgment will be entered herein accordingly.

(C.D. 4641)

DAVID E. PORTER *v.* UNITED STATES

Gloves

Motocross gloves, imported from Sweden and West Germany, were classified as leather, seamed, unlined men's gloves, not seamed wholly or in part by hand, valued over $20 per dozen pairs, under item 705.50 of the tariff schedules, dutiable at the rate of 25 per centum ad valorem. Plaintiff contested the classification, and claimed that the gloves had been specially designed for use in sports, and, therefore, were dutiable at only 9 per centum ad valorem under item 735.05. *Held:* Since plaintiff succeeded in proving that the gloves at bar were "specially designed for use in sports," specifically the sport of motocross, they are excluded from classification under item 705.50 of the tariff schedules by virtue of schedule 7, part 1, subpart C, headnote 1(a). Hence, plaintiff's protests were sustained.

SPORT—GLOVES SPECIALLY DESIGNED FOR USE IN SPORTS

Motocross was described as a sport wherein as many as 30 riders race competitively on a closed 1½- to 2-mile circuit dirt track over rough terrain for 30 to 40 minutes, requiring a special motocross motorcycle and protective clothing including gloves to protect their hands. That the gloves at bar were specially designed for use in the sport of motocross was made evident by their special features or characteristics such as a shortened palm, a reinforced thumb, an elastic band around the wrist, protective strips or ribbing on the top or back of the fingers and knuckles, and an out-seam construction, all of which make the gloves specially suitable for that sport. The fact they might be used on other occasions does not change their customs classification status as "gloves * * * specially designed for use in sports." See *Stonewall Trading Co.* v. *United States*, 64 Cust. Ct. 482, C.D. 4023, 313 F. Supp. 410 (1970). The fact that an article is "specially constructed for a particular purpose means merely that it includes particular features which adapt it for that purpose." *Plus Computing Machines, Inc.* v. *United States*, 44 CCPA 160, C.A.D. 655 (1957).

EVIDENCE—SURVEYS

Objections pertaining to the unscientific and unreliable manner in which surveys are prepared and conducted affect only the weight, rather than the admissibility of such surveys as evidence. *General Motors Corp.* v. *Cadillac Marine & Boat Co.*, 226 F. Supp. 716 (W.D.S.D. Mich. 1964). In the present case, surveys, conducted merely be asking distributors and riders their opinions whether motocross gloves were used in competition, were not entitled to probative value. A "sport" need not necessarily involve competition. See *Stonewall Trading Co.* v. *United States*, *supra*.

Court No. 72-1-00129

Port of San Diego

[Judgment for plaintiff.]

(Decided March 17, 1976)

Stein & Shostak (*S. Richard Shostak* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Frank J. Desiderio* and *Joseph R. Borich*, trial attorneys), for the defendant.

RE, Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain motorcycle gloves imported by plaintiff from Sweden and West Germany. The gloves were classified by the Customs officials as leather, seamed, unlined men's gloves, not seamed wholly or in part by hand, valued over $20 per dozen pairs, under item 705.50 of the Tariff Schedules of the United States (TSUS). They were therefore assessed with duty at the rate of 25 per centum ad valorem.

Plaintiff protests the classification, and claims that the motorcycle gloves were specially designed for use in the sport of motocross, and, therefore, are properly dutiable at only 9 per centum ad valorem under item 735.05 of the tariff schedules, as modified by T.D. 68-9, which provides for gloves "specially designed for use in sports." Plaintiff contends that since the gloves were "specially designed for use in sports," specifically the sport of motocross or motocross racing, they are excluded from classification under item 705.50 of the tariff schedules by virtue of schedule 7, part 1, subpart C, headnote 1(a).

Schedule 7, part 1, subpart C, item 705.50, TSUS, pursuant to which the merchandise was classified, provides as follows:

"Subpart C. – Gloves

Subpart C headnotes:

1. For the purposes of this subpart—
(a) the term 'gloves' includes all gloves and mittens designed for human wear,

except boxing gloves, golf gloves, baseball gloves, and other gloves specially designed for use in sports; * * *

* * * * * * *

Gloves of leather except gloves in item 705.35:

* * * * * * *

Seamed:

Men's, not lined:

* * * * * * *

Not seamed wholly or in part by hand:

* * * * * * *

705.50 Valued over $20 per dozen pairs..... 25% ad val."

Plaintiff claims that the merchandise should have been classified under item 735.05, TSUS, as modified by T.D. 68–9, under schedule 7, part 5, subpart D, which provides:

"Subpart D. – Games and Sporting Goods

Subpart D headnotes:

1. This subpart covers equipment designed for indoor or outdoor games, sports, gymnastics, or athletics, but does not cover—

* * * * * * *

(v) other wearing apparel, other than specially designed protective articles such as, but not limited to, gloves, shoulder pads, leg guards, and chest protectors;

* * * * * * *

735.05 Boxing gloves, and other gloves, not provided for in the foregoing provisions of this subpart, specially designed for use in sports..... 9% ad val."

The record consists of the testimony of eight witnesses, four called by plaintiff, and four for defendant. It also contains fourteen exhibits, ten introduced by plaintiff and four by defendant. Since the case was tried with commendable competence, it reveals a clear picture of the nature of the imported merchandise, and the various aspects of the sport of motocross.

Defendant, in its post-trial brief, states that the question presented is "[w]hether the gloves at bar were specially designed for use in the sport of motocross racing." It takes the position "that while motocross racing is a sport * * * motorcycling in general is not a

sport," and "that the so-called 'motocross' gloves were designed for the use of all motorcycle riders, are marketed as such to the general motorcycle public, and are used as such."

Plaintiff phrases the question presented in the statutory language of the tariff provisions, and states that the issue is: "Whether the gloves at bar, having features not found in ordinary gloves, are specially designed for use in sports, and are thereby excluded from classification under Item 705.50 in Schedule 7, Part 1, Subpart C, by headnote 1(a) thereof, and are classifiable in Schedule 7, Part 5, Subpart D, as other gloves, specially designed for use in sports, under Item 735.05, as claimed by plaintiff."

Plaintiff has introduced testimony to show that the gloves were specially designed for the sport of motocross, and were in fact so marketed and used. It contends that the special characteristics or features incorporated into the gloves show clearly that they were specially designed for the sport of motocross. Hence, they fully satisfy the statutory requirements for classification under item 735.05.

Defendant, on the other hand, asserts that the safety features of the gloves simply make them suitable for use in motorcycle transportation in general, and that the gloves are marketed "to the general motorcycle public."

That motocross racing is a sport has been stipulated. The evidence reveals that, although recently introduced from Europe, the sport has been widely accepted, and is generating a great deal of interest in the United States. Mr. Lars Larsson, plaintiff's first witness, and a professional motocross racer, testified that he emigrated to the United States from Sweden in 1967 to promote the sport of motocross. He became vice president of a company which imports motocross equipment into the United States.

Mr. Larsson described motocross as a sport wherein as many as 30 riders race competitively on a closed 1½- to 2-mile circuit dirt track over rough terrain for 30 to 40 minutes. His testimony fully described the sport, and the equipment and clothing that is either required or necessary in order to participate with relative safety and comfort. Additionally, his testimony indicates that the motocross gloves are used in related sports called "trial," "speedway" or "enduro" racing.

The cross-examination of Mr. Larsson was helpful and enlightening. It was shown that there are internationally accepted rules for motocross racing, and it was stipulated that the American Motorcycle Association Motocross Competition Rule Book specifically requires certain protective clothing and equipment. The parties agreed that the rules "specifically provide for helmets, goggles and boots," and that "clothing is defined with respect to its material but not with respect to any particular item." Mr. Larsson testified that before entering a

race "they have a technical inspection of you and the motorcycle." He stated that for the "technical inspection * * * [y]ou have to show them that you have your helmet, goggles, gloves, pants and leather boots, and a jersey." In answer to specific questions by counsel for defendant, Mr. Larsson testified that the inspection includes the wearing of gloves, and that the gloves in issue are "one type" that would comply with the requirement for gloves.

The motocross racing track is a dirt road course. As described by Mr. Larsson, "[i]t goes over hills – down hills – over rocks – water crossing – off camber corners * * *." The testimony revealed that it is precisely this rough terrain which requires that the motocross rider wear special protective clothing. As the sport increases in popularity, there is a greater demand for motocross bikes, equipment, and accessories, such as plaintiff's motocross gloves. All of plaintiff's witnesses testified that the gloves in issue were specially designed to meet that demand, and protect the hands of the motocross racer on the dirt track.

It is pertinent to note that the motocross or "dirt" motorcycle differs from the motorcycle suitable for lawful or safe "street" use in the following essential respects:

(a) it has a narrower frame;
(b) it has a greater ground clearance;
(c) it has "knobby" tires which cannot be used on paved roads;
(d) it lacks the necessary electrical lighting equipment; and
(e) it is lighter than the "street" motorcycle in that it weighs only 220 pounds instead of 400 to 500 pounds.

Mr. Larsson testified that he has advised designers of motocross gloves on the special features that motocross racers require in a glove that will protect their hands. Commenting on the elastic band around the wrist of the glove, Mr. Larsson stated that this feature was essential "to protect you from mud and water to get into your hand, and sand, because if you did get any of this in your hand, that would be just about the end of it because it would immediately tear your hands up."

Mr. Richard Miller, plaintiff's second witness, was editor of a motocross competition periodical entitled, "Motocross Action Magazine." Since the magazine was dedicated to motocross racing, and other dirt competition, it often contained motocross glove advertisements. Having raced in competition, and having sold motocross accessories, such as motocross gloves, Mr. Miller was qualified to speak on the special equipment that is either required or necessary in the pursuit of the sport of motocross.

Plaintiff's third witness, Mr. M. Edison Dye, imports, manufactures, and distributes motocross motorcycles and accessories. He

has sponsored motocross races, and has also assisted in the design of motocross gloves. Mr. Dye testified that, in his opinion, the motocross gloves which he imports are used only in motocross racing. Plaintiff's final witness, Mr. Robert Maynard, a motocross racer and motorcycle dealer, testified that the motocross glove "protects you from branches and sticks * * * [and] rocks flying off a competitor's motorcycle. It saves some pretty painful injuries."

Defendant's witnesses entered the field of motocross only recently. They are not expert motocross riders, and lack the expertise of plaintiff's witnesses. Mr. Robert Huff, manager of technical development for a company which manufactures and sells gloves and protective clothing, identified defendant's exhibit B as a motocross glove he helped to design. Mr. Huff testified that the glove, though marketed as a motocross glove, was not designed for use in sports but for motorcycle riding in general. Admittedly, this glove was a later copy inspired by plaintiff's gloves. This does not disprove the fact that plaintiff's motocross gloves were specially designed for motocross racing, and are marketed and used in the sport of motocross.

A witness for the defendant testified that he observed motorcyclists wearing motocross gloves for highway use. The testimony, however, indicates that, although motocross gloves may increase protection in ordinary motorcycle riding, the street or highway rider would find plaintiff's gloves uncomfortable. For example, Mr. Robert Maynard, an expert witness for plaintiff, testified that the motocross glove "offers absolutely no protection from the cold." Distinguishing between motocross gloves, and "street" gloves used by motorcyclists in general, Mr. Maynard stated that the motocross gloves lack both "padding in them to keep your hands warm," and a "gauntlet to keep the wind from going up your sleeves."

All of the witnesses for plaintiff were familiar with the design, importation, sale and use of the gloves in issue. Additionally, they were exceptionally well qualified to testify on all phases of the sport of motocross, and the equipment and accessories necessary for the sport. Their testimony was candid and reliable, and clearly inspired confidence. As pioneers who introduced the sport into the United States, successful and winning riders, sponsors of motocross races, and writers for magazines having a world-wide circulation for motocross enthusiasts, their testimony "is of high probative value." *Davis Products, Inc., Frank M. Chichester* v. *United States*, 59 Cust. Ct. 226, C.D. 3127 (1967). It clearly establishes that the gloves in issue were specially designed for, and used by, motocross riders engaged in the sport of motocross.

On the crucial issue whether the gloves were specially designed for the sport of motocross, as claimed by plaintiff, or "the general

motorcycle public," as is urged by the defendant, the court finds for the plaintiff. This finding is based upon an examination of the gloves themselves, the exhibits, and the unquestioned reliability of the testimony of all of plaintiff's witnesses.

In customs classification cases it is well established that whether an article is "specially designed" or "specially constructed" for a particular purpose may be determined by an examination of the article itself, its capabilities, and its actual use or uses. See cases cited in *Sports Industries, Inc.* v. *United States*, 65 Cust. Ct. 470, C.D. 4125 (1970). It is equally clear that a sample of the merchandise is a potent witness. *United States* v. *The Halle Bros. Co.*, 20 CCPA 219, T.D. 45995 (1932); *United States* v. *Fred. Gretsch Mfg. Co., Inc.*, 28 CCPA 26, C.A.D. 120 (1940).

On the present record the evidence is overwhelming that the gloves were specially designed, sold and used for the sport of motocross. The special features incorporated in the motocross gloves not only confirm that they were specially designed for motocross, but also distinguish them from other motorcycle gloves designed for "street riding." It cannot be disputed that the motocross gloves contain the following special features or characteristics:

(a) a shortened palm facilitating a smooth grip of the handle bars in order to avoid blisters;
(b) a reinforced thumb to protect against the rigid edge of the handlebar grips;
(c) an elastic band around the wrist to prevent sand, gravel and the like, from entering the glove;
(d) protective strips or ribbing on the top or back of the fingers and knuckles which act as bumpers;
(e) an out-seam construction to prevent blisters.

The incorporation of these special features into the gloves clearly increases the cost of manufacture. The higher price to consumers would discourage those who could purchase a less expensive glove that would be suitable for motorcycle transportation. Purchasers, however, who ride on rough terrain, and need the added protection, pay a higher price for plaintiff's gloves because of their special features.

By means of "surveys," two of defendant's witnesses attempted to show that motocross gloves were used chiefly for recreational purposes or street riding, and not in competition. These "surveys" were conducted by telephone calls and visits to trade shows and distributors. Mr. J. Terry Cochran, director of marketing and national sales manager for a company which manufactures gloves and protective clothing, testified that his "[survey] findings were 30 per cent competition and 70 per cent non-competition." Mr. Robert Denman, a manufacturers' representative, testified that his "overall calculation

was that 27 per cent of [motocross] gloves were used in competition and 73 per cent in non-competition or other use."

Since the case of *United States* v. *88 Cases, More or Less, Containing Bireley's Orange Beverage*, 187 F. 2d 967 (3d Cir. 1951), federal courts have admitted the results of surveys despite their hearsay character. Objections which pertain to the unscientific and unreliable manner in which a survey is prepared and conducted affect only the weight, rather than the admissibility of the evidence. *General Motors Corp.* v. *Cadillac Marine & Boat Co.*, 226 F. Supp. 716, 734 (W.D.S.D. Mich. 1964). A statement of the court in the *General Motors* case, that there "are many signs that the survey was a great deal less than scientifically prepared," is equally applicable here. 226 F. Supp. at 738.

The results of defendant's surveys, conducted merely by asking distributors and riders their opinions whether motocross gloves were "used in competition," are not entitled to probative value for a variety of reasons. To mention some: (1) the responses were percentage estimates often obtained without consultation of sales records; (2) these estimates were furnished by individuals whose source of knowledge was never established; (3) no definition of terms such as "competition" was used in the surveys, and one can only guess what was in the mind of the person questioned; and (4) the data from which the results were derived is unavailable, and cannot be examined or verified.

The surveys were limited to a "competitive-noncompetitive" use comparison. Viewed in the most favorable light they inquired about the use of gloves in "competition," and not whether they were used in sports. Furthermore, since defendant's witnesses appear to have too restrictive a view of "sports," limiting them exclusively to competitive sports, the results of their surveys are unreliable if not misleading.

That a sport need not necessarily involve "competition" can be gleaned from recent cases decided by this court. In *Stonewall Trading Co.* v. *United States*, 64 Cust. Ct. 482, C.D. 4023, 313 F. Supp. 410 (1970), ski gloves, specially designed for the sport of skiing, were properly dutiable under the tariff provision which covered "ski equipment." Although skiing does not necessarily involve competition, at no time was it suggested it was not a sport. Relying upon the reasoning of *American Astral Corporation* v. *United States*, 62 Cust. Ct. 563, C.D. 3827, 300 F. Supp. 658 (1969), the court stated:

> "In the words of Judge Maletz in the *American Astral Corporation* case, the statutory designation of 'equipment' is 'satisfied once it is shown that the article is specially designed for use in the game or sport.' On the question of special design, notwithstanding defendant's efforts to minimize the importance of the

special features of the gloves, plaintiff's case is unassailable." 64 Cust. Ct. at 489.

In *Sports Industries, Inc.* v. *United States*, 65 Cust. Ct. 470, C.D. 4125 (1970), underwater divers' gloves were held to be gloves specially designed for use in sports within item 735.05, the tariff item under which plaintiff claims classification for the motocross gloves. Much that is written in the *Sports Industries* decision is applicable to the case at bar. There, because of the evidence of the physical characteristics of the gloves, the court held that they were specially designed for the sport of underwater swimming, skin diving or scuba diving.

In the decided cases, the gloves were held to be sports gloves because their special features, characteristics and construction revealed that they were "gloves * * * specially designed for use in sports." The following quotation from the *Sports Industries* case is particularly pertinent:

> "* * * the divers gloves in issue possess special features which clearly indicate that they were 'specially designed' for use in the sport of underwater swimming. If the tariff schedules were to contain a pertinent provision for underwater swimming equipment, it would seem clear that, under the applicable authorities, the gloves in issue would qualify as 'equipment'. There is, however, no specific provision which covers underwater swimming 'equipment'. Nevertheless, there would seem to be no question that underwater swimming, pursued solely for personal pleasure, and not commercially or for compensation, is a 'sport'. Under the circumstances, therefore, the gloves are classifiable under item 735.05 of the tariff schedules which covers 'gloves * * * specially designed for use in sports'." 65 Cust. Ct. at 474.

What is said of underwater swimming and divers' gloves in the *Sports Industries* case is equally applicable to the sport of motocross, which requires a special motorcycle, special equipment, and special accessories.

The solitary "dirt" rider on a motocross motorcycle who seeks the challenge of a rough terrain also engages in a sport as does the underwater swimmer and the skier. Equally important is the fact that such a rider requires the protection of motocross gloves quite as much as the rider who participates in an organized competition.

Also pertinent is the statement in the Summaries of Trade and Tariff Information, Schedule 7, Volume 4 (1968) at page 153 which includes "special bicycling gloves" as merchandise classifiable under item 735.05. In its brief, plaintiff comments that the inclusion of "special bicycling gloves" within item 735.05 "is particularly significant because if bicycling is deemed to be a sport for the purposes of

item 735.05, then certainly off-the-road cycling, with or without competition would also qualify."

In support of its position that "motocross gloves" were not specially designed for motocross, defendant, in its post-trial brief, stated that "[t]he term 'motocross gloves' is merely a 'generic term' in the trade, indicating that the manufacturer tried to sell them to motocross riders among other motorcyclists." Not only is there no support in the record for defendant's assertion, but it also attributes to plaintiff the poor sales policy of giving his product a limiting name which would restrict its market.

In furtherance of its contention that the motocross gloves "were specially designed for use of all motorcyclists," a witness for defendant testified that he saw motocross gloves used by motorcyclists not engaged in sport. This, however, does not change the customs classification status of "gloves * * * specially designed for use in sports." As stated in the *Stonewall Trading* case, "[t]he fact that the gloves may be used on [other] occasions * * * does not warrant a different result." 64 Cust. Ct. at 490. This point had been previously decided by the Court of Customs and Patent Appeals in the case of *Plus Computing Machines, Inc.* v. *United States*, 44 CCPA 160, C.A.D. 655 (1957) which teaches that the fact that an article is "specially constructed for a particular purpose means merely that it includes particular features which adapt it for that purpose." Significantly, the appellate court added that "[t]he purpose in question need not be the sole one served by the article and may not even be the principal one." 44 CCPA at 167.

The reasoning of the decided cases shows that since the court has determined that the motocross gloves were specially designed for use in the sport of motocross, they are classifiable as claimed even though they were not used exclusively for the sport of motocross.

In customs classification cases it is axiomatic that, in order to prevail, the contestant must bear a dual burden of proof. Plaintiff must prove that the customs classification of the merchandise is erroneous, and that the claimed classification is correct. In the present case it is the determination of the court that plaintiff has succeeded in bearing his dual burden, and that the presumption that attaches to the correctness of the classification of the Customs officials has been overcome.

Since the motocross gloves at bar were "specially designed for use in sports," they are excluded from classification under item 705.50 of the tariff schedules, and are properly classifiable under item 735.05.

The protests are sustained, and judgment will issue accordingly.

(C.D. 4642)

THE ENGLISHTOWN CORPORATION v. UNITED STATES

Opinion on Cross-Motions for Summary Judgment

Court No. 69/9811

Port of New York

[Judgment for defendant.]

(Decided March 23, 1976)

Allerton deC. Tompkins for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Robert B. Silverman*, trial attorney), for the defendant.

Freeman, Meade, Wasserman, Sharfman & Schneider (*Louis Schneider* and *Thomas G. Travis* of counsel) for Clairol, Inc., amicus curiae.

BOE, Chief Judge: In the instant action the plaintiff has moved for summary judgment pursuant to rule 8.2 of this court. The defendant has denied plaintiff's allegation that there are no genuine issues of material facts to be resolved and submits that said action should be tried by the court with respect to the facts in issue. However, the defendant alternatively has cross-moved for summary judgment in its favor in the event this court should find that no disputed issues of fact exist sufficient to preclude a determination of the instant action on the motions for summary judgment.

The merchandise in question, identified and described in the pleadings as "Electric Travel Beauty Kits," was imported from Japan by the plaintiff and entered at the port of New York on January 25, 1968. Upon liquidation the merchandise was classified under item 544.51, TSUS, as modified by Presidential Proclamation 3822 (T.D. 68–9) with duty assessed at the rate of 29.5% ad valorem, providing:

	Mirrors, made of any of the glass described in items 541.11 through 544.41, with or without frames or cases (except framed or cased mirrors of precious metal, and mirrors designed for use in instruments):	
544.51	Not over 1 sq. ft. in reflecting area	29.5% ad val.

The plaintiff, however, contends that the merchandise should be classified as an entirety under item 688.40, TSUS, as modified by T.D. 68–9 providing:

688.40	Electrical articles, and electrical parts of articles, not specially provided for	10% ad val.

In its complaint the plaintiff has made alternative claims for the classification of the merchandise in question under items 706.60, 653.35, 653.37, 653.39, 653.95, 654.00, 657.20 and 657.35, TSUS.

From the statement of material facts filed by the respective parties in accordance with the provisions of rule 8.2(b), it appears that no genuine issue of fact exists which precludes this court from making a determination of the instant case upon the motion and cross-motion for summary judgment as submitted. The initial attention of this court, accordingly, is directed to a determination as to whether the plaintiff has successfully met the first portion of its dual burden of proof by producing sufficient evidence to support a conclusion that the classification of the customs official was erroneous. *United States* v. *New York Merchandise Co., Inc.*, 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970). In attempting to meet this burden the plaintiff asserts that the merchandise in question properly falls within the "more than" doctrine of customs law and that, accordingly, its classification must be other than the *eo nomine* designation of a mirror.

From the many decisions of this court and our appellate court which have considered the "more than" doctrine, it is well settled that the ultimate determination of this question of law is necessarily dependent on the facts of each individual case. *E. Green & Son (New York), Inc.* v. *United States*, 59 CCPA 31, C.A.D. 1032, 450 F. 2d 1396 (1971). Discussing the rationale of this doctrine, the Customs Court in the case of *Irving W. Rice & Co., Inc.* v. *United States*, 65 Cust. Ct. 125, 129, C.D. 4064 (1970), stated:

> "* * * the 'doctrine' is directed, not to the question of their component material of chief value, but to the question as to whether the articles are predominately *mirrors* in frames or cases or are more than *mirrors* in frames or cases."

Thus, it has been determined that an article consisting of an "enameled silver powder box" with a mirror affixed to the lid was more than a mirror in a frame or case for the reason that the mirror was a minor and an incidental part of an elaborate and expensive box. *United States* v. *Bonwit, Teller & Co. et al.*, 17 CCPA 96, T.D. 43429 (1929). With similar reasoning merchandise consisting of a folding leather case, containing pockets for holding miscellaneous articles and with a mirror fastened on one of the flaps, was determined to be more than a mirror for the reason that its principal function was designed to hold and carry miscellaneous toilet articles. *Freedman & Slater* v. *United States*, 17 CCPA 104, T.D. 43431 (1929). Conversely, in a recent decision of the Court of Customs and Patent Appeals, it was determined that a rearview bicycle mirror attached to the bicycle by a bracket was properly classified as a mirror under item 544.51, TSUS, and not subject to the application of the "more

than" doctrine. The said article was held to possess a single function only, namely—that of a mirror. *United States* v. *Oxford International Corp.*, 62 CCPA 102, C.A.D. 1154, 517 F. 2d 1374 (1975). In distinguishing those decisions in which the "more than" doctrine has been determined to be applicable, the court stated:

> "Similarly with the other cases cited by appellee, in each there was a *second significant function* in the importation justifying the application of the 'more than' doctrine." 62 CCPA at 105. [Emphasis added.]

In summary, the applicability of the "more than" doctrine necessarily requires the determination from all of the evidentiary facts presented of the following inquiries: (1) Does the article possess a predominant and principal function and are the other capabilities or uses of the article ancillary or incidental thereto? (2) Does the article in question possess a "second significant function"? An affirmative answer to inquiry (1) and a negative answer to inquiry (2) serve to preclude the application of the doctrine. *Oxford International Corp.*, *supra.*

Examination of representative samples of the merchandise in question submitted as exhibits by the plaintiff reveals that the article consists of a plastic case or container approximately 13″ long, 9″ high and 3″ wide with a handle attached to the top side. One side of the container is removable and a relatively small portion thereof includes a compartment divided into three partitions suitable for some storage.*

In a storage space near the bottom of the plastic container, also described as a kit, there is an electric cord which may serve to connect the male electric plug of the kit to an electric power outlet. When the opposite side of the container is removed, two metal backed mirrors, back to back and mounted in one frame (one mirror conventional, one mirror magnified) approximately 8¼″ long and 6¼″ high, are permitted to freely revolve and rotate. The article contains certain electrical features consisting of (a) four electric light bulbs, each inserted into a "screw-in" electric socket and positioned immediately in front of movable metal reflectors, capable of diverting light to and from the encased mirror within the kit, (b) a three-position switch—off, low and high, (c) an electric outlet to which electrical appliances may be connected, and (d) an internal electrical wiring system permitting the use of the outlets and electric bulbs aforedescribed.

The plaintiff has further submitted affidavits of two witnesses, the primary purport of the testimony of each being a description of the

*One partition is approximately 7½″ by 2½″, a second partition is approximately 4½″ by 3¼″ and a third partition is approximately 3″ by 3¼″.

basic character of the article in question. The testimony includes the fact that the electric light bulbs permit the use of the article as a reading and work light or as a night light; that the electrical outlet permits one to connect thereto such electrical appliances as "razors," "manicure and pedicure kits," "vibrating massage appliances," "hot rollers," and "toothbrushes," all of which do not necessarily require the use of a mirror. Further testimony is adduced by the plaintiff in the form of an affidavit that the cost value of the mirror is significantly less than the metal wiring or other component parts of the article in question.

Although the court is of the belief that the testimony adduced through affidavits and presented herein relates to facts which are properly admissible in evidence, considerable doubt exists in the mind of the court with respect to the sufficiency as well as the probative value of this testimony. The affidavit of a witness recites at length the capabilities and use other than that of a mirror to which the merchandise in question might be employed. Such general statements, however, at the most can be construed only as declarations and conclusions without further corroboration. *Keer, Maurer Company* v. *United States*, 46 CCPA 110, C.A.D. 710 (1959). It is obvious that *any* electrical appliance, whether it be a toaster, blender, percolator, razor or toothbrush, possessing a cord bearing a suitable connecting plug may be inserted into the female electric outlet of the merchandise in question in the same manner as such an appliance might be connected to any wall electrical outlet. No testimony, however, has been adduced with respect to the value, the extent, degree or use of its capabilities. Mere characterization of the merchandise is not a substitute for proof of its utilization.

The plaintiff's brief has referred to the sample kit as a "potent witness." It is, indeed, possible that an exhibit may be so characterized. *United States* v. *The Halle Bros. Co.*, 20 CCPA 219, T.D. 45995 (1932). *Marshall Field & Co.* v. *United States*, 45 CCPA 72, C.A.D. 676 (1958). However, in the instant case this court does not share such a conclusion. Examination and inspection of the sample submitted by plaintiff in connection with its motion for summary judgment appear to negate the basic contention of the plaintiff that the merchandise in question is "more than" a mirror. In the absence of affirmative testimony to the contrary, it would appear unlikely to the court that the electric light feature of the beauty kit would be used as a reading or work light—if any other reasonable source of light were available. Nor would it appear probable to the court in the absence of affirmative testimony to the contrary that the electric outlet would be used to any appreciable extent as a "connecting source" in the operation and use of an electric toothbrush or the other appliances referred

to in the affidavit of plaintiff's witness (Mercer). The principal and predominant function of the article in question is that of a mirror. Without a doubt the illumination of the mirror through means of electric light bulbs and reflectors will, on occasion, make the use thereof desirable. The fact remains, however, that the mirrors are well capable of use with or without additional illumination and that the use of the light in connection therewith only serves to enhance the principal and predominant function and purpose of the article in question. *Ross Products, Inc.* v. *United States*, 58 CCPA, 1, C.A.D. 994, 433 F. 2d 804 (1970). In connection with the foregoing, it is believed that the comments of this court in the case of *Astra Trading Corp.* v. *United States*, 56 Cust. Ct. 555, 561, C.D. 2703 (1966), are particularly applicable:

> "We do not believe that the additional feature of illumination transforms the basic purpose of the imported article from use as a screwdriver into some other use; nor do we believe that the illuminating feature gives the article a use in addition to its intended use as a screwdriver. For, illumination notwithstanding, the article remains essentially a device restricted to the use of turning screws, i.e., a screwdriver. Our decision also is influenced by the well-established principle that, in determining classification, an *eo nomine* designation must, unless a contrary legislative intent clearly is indicated, be preferred to terms of general description and to enumerations which are broader in scope and less specific."

Neither from the testimony submitted by affidavit nor from the exhibit itself has sufficient evidence been presented to establish that the merchandise in question possesses "* * * a second significant function * * * justifying the application of the 'more than' doctrine." *Oxford International Corp.* v. *United States*, *supra*.

Although the complaint of the plaintiff contains numerous claimed alternative classifications, no appreciable reference or discussion has been made with respect thereto except as to the item relating to a description of the merchandise in question and included in plaintiff's statement of material facts supporting its motion for summary judgment and denominated as: "7. Iron or steel base metal is the component material of chief value, which metal is not coated or plated with precious metal." It appears manifest that the foregoing description is specified for the purposes only of distinguishing the mirror in question from "framed or cased mirrors of precious metal." Although the component material of chief value of an article may on occasion have some weight in the determination of its classification, once the predominant feature or function of an article has been established, as in the instant case, the chief value of its component materials is no longer a fact in issue. *Alltransport, Inc., Sterling Novelty Products* v.

United States, 58 Cust. Ct. 98, C.D. 2896 (1967); *Irving W. Rice Co., Inc.* v. *United States*, 65 Cust. Ct. 125, C.D. 4064 (1970).

The plaintiff has failed to sustain its first burden of proof to overcome the presumption of correctness attaching to the classification of the customs official and to establish that such classification is erroneous. It, therefore, is unnecessary and without purpose for this court to consider the claimed correct classification or the alternative classifications urged by the plaintiff in its effort to sustain the second portion of its dual burden of proof.

Accordingly, the cross-motion of the defendant for summary judgment be and is hereby granted, and the motion of the plaintiff for summary judgment is in all things denied.

Let judgment be entered accordingly.

(C.D. 4643)

THE ASHFLASH CORPORATION *v.* UNITED STATES

Portable electric lamps—"Blinker" lanterns

PORTABLE ELECTRIC LAMPS—"BLINKER" LANTERNS—"MORE THAN" DOCTRINE

The involved "blinker" lanterns are portable battery-operated combination articles comprised of a searchlight portion for illumination and an automatic signal-warning red flasher for emergency signalling. Although utilizing a common power source (viz., dry cell batteries), the searchlight and signal-warning flasher components have separate bulbs, sockets, lenses, wiring, contacts, and in some instances separate switches. The signal-warning function does not assist, improve, or augment the searchlight function. The court has concluded that the imports serve two independent and coequal functions: as a searchlight and as a signal-warning flasher; and that therefore the latter function is not incidental, auxiliary or subordinate to the searchlight function. Accordingly, the "blinker" lanterns are "more than" the portable electric lamps covered by item 683.80, TSUS, as classified by the Government, and are properly dutiable as electrical articles not specially provided for under item 688.40, TSUS, as claimed by plaintiff. *Fedtro, Inc.* v. *United States*, 59 CCPA 16, C.A.D. 1028, 449 F. 2d 1395 (1971); *Fedtro, Inc.* v. *United States*, 72 Cust. Ct. 267, C.D. 4548, 376 F. Supp. 1398 (1974); and *Oxford International Corp.* v. *United States*, 70 Cust. Ct. 217, C.D. 4433 (1973) followed. *Continental Exchange, Ltd.* v. *United States*, 60 Cust. Ct. 233, C.D. 3333, 281 F. Supp. 892 (1968); *Astra Trading Corp.* v. *United States*, 56 Cust. Ct. 555, C.D. 2703 (1966); and *Remington Rand Div. of Sperry Rand Corp.* v. *United States*, 51 CCPA 57, C.A.D. 837 (1964) distinguished.

CLASSIFICATION OF COMBINATION ARTICLES HAVING FUNCTIONS COVERED BY DIFFERENT TARIFF PROVISIONS

Combination articles having coequal functions may not be classified under a tariff description applicable only to one of the functions. While the searchlight function of the "blinker" lanterns is covered by item 683.80, the signal-warning flasher function on the other hand is embraced by the provision of item 685.70, TSUS, for electrical visual signalling apparatus. Consequently, the judicial precedents applying the "more than" doctrine to combination articles having coequal functions covered by different tariff provisions are plainly applicable.

SAMPLES—POTENT WITNESSES

Examination of the samples in evidence, including turning on the signal-warning flasher outdoors at night, sufficiently demonstrated their potential usefulness to motorists and others as a signal-warning apparatus in emergency situations. Hence, expert testimony was not required to establish this fact. *Oxford International Corp.* v. *United States*, 70 Cust. Ct. 217, 223, C.D. 4433 (1973).

JUDICIAL NOTICE—USE OF "BLINKER" LANTERNS FOR EMERGENCY SIGNALLING

Moreover, the court may take judicial notice that "blinker" lanterns, such as those before the court, are widely advertised and sold to consumers in automotive, camping and other retail outlets as devices which may be used for their signal-warning function as well as their illuminating function.

Court Nos. 69/43133, etc.

Ports of New York and Los Angeles

[Judgment for plaintiff.]

(Decided March 30, 1976)

Joseph Winston for the plaintiff.
Rex E. Lee, Assistant Attorney General (*John A. Gussow* and *Joseph R. Borich*, trial attorneys), for the defendant.

NEWMAN, Judge: The issue in these 36 protests, consolidated pursuant to defendant's motion, concerns the proper tariff classification of certain "blinker lanterns", which were imported from Hong Kong during the years 1967 through 1970 and entered at the ports of New York and Los Angeles.

The merchandise was assessed with duty at the rate of 13.75 per centum ad valorem under item 683.80 of the Tariff Schedules of the United States. Plaintiff claims that the imports are properly dutiable under item 688.40, TSUS, as modified by T.D. 68–9. The applicable

rate of duty under item 688.40 pursuant to T.D. 68–9 depends upon the year the merchandise was entered.[1]

I have concluded that the Government's classification was erroneous, and that the merchandise is properly dutiable under item 688.40, TSUS, as claimed by plaintiff.

Statutes Involved

Classified under:

	Portable electric lamps with self-contained electrical source, and parts thereof:	
	* * * * * * *	
683.80	Other	13.75% ad val.

Claimed under:

688.40	Electrical articles, and electrical parts of articles, not specially provided for	* * *

The Record

Each party called one witness: plaintiff's witness was Timothy A. O'Connell, its executive vice president; defendant's witness was Robert Brindley, market manager for the Battery Products Division of Union Carbide Corporation. Additionally, numerous exhibits (20 by plaintiff, 6 by defendant), including representative samples of the merchandise, were introduced in evidence.

The pertinent facts are:

The imports comprise various models of portable battery-operated "blinker" lanterns. The term "blinker" refers to the fact that in addition to a searchlight, which throws a constant light beam through a clear lens, the lanterns have an automatic signal-warning red flasher for use in emergency situations. Both the signal-warning flasher and searchlight portions utilize a common power source, viz., a dry cell battery or batteries.

The testimony, as well as an examination of the samples, reveals that the signal-warning flasher consists of a "blinking bulb",[2] socket, wiring, contacts, a red lens, or a translucent plastic collar which encloses the flasher in some of the models. Also, in eight of the imported models the signal-warning flasher includes a telescoping or a "swinging" (pivoting) arm. Some models have separate switches for the searchlight and the signal-warning flasher, while other models have a single multipositional switch designed to activate both the searchlight and signal-warning flasher. However, regardless of whether the

[1] The rates of duty under item 688.40, TSUS, as modified by T.D. 68–9, for the years 1967, 1968, 1969 and 1970 were 11.5, 10, 9, and 8 per centum ad valorem respectively.

[2] This bulb "is caused to blink by virtue of two dissimilar metal materials deflecting against one another" (R. 159–160).

particular model has a single multipositional switch or dual switches, the searchlight and signal-warning flasher may be used concurrently or independently.

It further appears that portable battery-operated lanterns are sold which function solely as searchlights and hence do not have a signal-warning flasher (viz., exhibit 2). Conversely, portable battery-operated signal-warning flashers are sold which serve no other function (viz., exhibit 20). Thus, the imports combine both the searchlight and signal-warning functions with a common source of power for both functions.

To summarize, I find that although utilizing a common power source, the searchlight and signal-warning flasher portions have separate bulbs, sockets, lenses, wiring, contacts, and in most of the models separate switches; that the imports serve two independent and coequal functions as a searchlight and as a signal-warning flasher; that the signal-warning function does not assist, improve or augment the searchlight function; and finally, that neither of the dual functions is incidental, auxiliary or subordinate to the other function.

Contentions of the Parties

Defendant contends that item 683.80 is in *eo nomine* provision and that "the merchandise at bar is, in fact, a form of portable electric lamp includable in the *eo nomine* provision for such articles, and was properly classified under item 683.80 * * *". "In essence", defendant urges "the portable electric lamps, notwithstanding the blinking features, which are subordinate and incidental to the main function of providing illumination, are not 'more than' portable electrical lamps".

Plaintiff, on the other hand, insists that each of the imports is a combination illuminating and signalling device, and that neither of those dual functions is subordinate to the other. Consequently, argues plaintiff, the signal-warning flasher makes the imports "more than" the portable electric lamps covered by item 683.80.

Issue Presented

The legal issue is whether the "blinking" lanterns are a form of portable electric lamp within the *eo nomine* provision therefor in item 683.80, TSUS, as contended by defendant, or whether the signal-warning flasher makes the imports "more than" such portable lamps, as urged by plaintiff.

Decision

It is well settled that where merchandise has a single primary function and an incidental, subordinate, or secondary function, it is

classifiable on the basis of its primary design, construction, and function. *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F. 2d 1397 (1973); *Great Western Sugar Co. et al.* v. *United States*, 59 CCPA 56, C.A.D. 1038, 452 F. 2d 1394 (1972); *Arthur J. Fritz & Co. et al.* v. *United States*, 59 CCPA 46, C.A.D. 1036, 452 F. 2d 1399 (1971); *United Carr Fastener Corporation* v. *United States* (*Northern Screw Corp., Party in Interest*), 54 CCPA 89, C.A.D. 913 (1967).

Further, a long line of authorities holds that merchandise which constitutes more than a particular article or which has additional nonsubordinate or coequal functions is not classifiable as that article. *Dollar Trading Corp.* v. *United States*, 60 CCPA 10, C.A.D. 1074, 468 F. 2d 631 (1972); *United States* v. *Flex Track Equipment Ltd. et al.*, 59 CCPA 97, C.A.D. 1046, 458 F. 2d 148 (1972); *E. Green & Son* (*New York*), *Inc.* v. *United States*, 59 CCPA 31, C.A.D. 1032, 450 F. 2d 1396 (1971); *Servo-Tek Products Co., Inc.* v. *United States*, 57 CCPA 13, C.A.D. 969, 416 F. 2d 1398 (1969); *Cragstan Corporation* v. *United States*, 51 CCPA 27, C.A.D. 832 (1963); *United States* v. *The A. W. Fenton Company, Inc.*, 49 CCPA 45, C.A.D. 794 (1962); *United States* v. *Milton Diamond and Massce-Barnett Co., Inc.*, 42 CCPA 9, C.A.D. 561 (1954); *Geo. S. Bush & Co., Inc.* v. *United States*, 38 CCPA 30, C.A.D. 435 (1950); *United States* v. *Sutherland International Despatch et al.*, 21 CCPA 264, T.D. 46790 (1933); Sturm, *A Manual of Customs Law* (1974), pp. 298–300. Hence, it follows that combination articles having coequal functions may not be classified under a tariff description applicable only to one of the functions. As the rule was aptly put by Judge Re in *Oxford International Corp.* v. *United States*, 70 Cust. Ct. 217, 221, C.D. 4433 (1973):

> It is settled that a combination or multifunction article is not classifiable for tariff purposes under a specific statutory provision describing only one of those features or functions as the importation is more than the article described therein. * * *

In *Oxford*, certain "horn-lights" classified as parts of bicycles under item 732.36, TSUS, were claimed properly dutiable under the provision in item 685.70, TSUS, for electrical "sound or visual signalling apparatus". Judge Re found that while the horn portion of the combination articles was an electrical sound signalling device, the light portion did more than merely serve as a signal in that it primarily functioned as an illuminating device. Consequently, the court determined "that the horn-lights possess an important illuminating feature at least coequal to their signalling function, thus making them more than signalling apparatus". (70 Cust. Ct. at p. 224.)

Here, the primary function of the signal-warning flasher is plainly that of signalling rather than illumination. The signal-warning flasher, then, is essentially an electrical visual signalling apparatus of the type covered by item 685.70. While in *Oxford*, it was the light (illuminating) portion of the horn-light combination articles that made them more than sound and visual signalling apparatus under item 685.70, here it is the signal-warning flasher (a signalling device) which constitutes the "blinker" lanterns more than the portable lamps covered by item 683.80. Thus, notwithstanding the factual difference between *Oxford* and the present case, the "more than" rationale applied by the court in *Oxford* is fully applicable here.

In sum, while the searchlight portion of the imports concededly falls within the purview of item 683.80, the signal-warning flasher portion performs a visual signalling function which is separately covered by item 685.70. The separate tariff provision for electrical visual signalling apparatus in item 685.70 is a clear indication of a Congressional intent to exclude battery-operated blinking lights used for signalling from item 683.80. Accordingly, the judicial precedents applying the "more than" doctrine to combination articles having coequal functions covered by different tariff provisions are obviously controlling in the present case.

As previously mentioned herein, the components comprising the signal-warning flasher in the "blinker" lanterns, i.e., the bulb, socket, wiring, contacts, lens, and in some of the models a swinging or telescoping arm, are independent of and take no part in the operation of the searchlight function.[3] Moreover, as we have noted, the two functions utilize separate switches or a selectively operative multipositional switch. This factual setting is analogous to those in *Fedtro, Inc.* v. *United States*, 59 CCPA 16, C.A.D. 1028, 449 F. 2d 1395 (1971), and in *Fedtro, Inc.* v. *United States*, 72 Cust. Ct. 267, C.D. 4548, 376 F. Supp 1398 (1974).

In the first cited *Fedtro* case, merchandise invoiced as "4-way Flasher Switches for Automobiles" was classified by the Government under the provision for switches in item 685.90, TSUS. The importer claimed that the merchandise was more than a switch and properly dutiable as visual signalling apparatus under item 685.70, TSUS. The article in issue was described by the appellate court as follows (59 CCPA at p. 18):

> The imported article is used to connect the front and back signal lamps of an automobile with the flasher circuit for the directional signals, in such a manner that all four lamps flash

[3] It is, however, noted that the searchlight and signal-warning flasher in most of the models share a common "base plate" adapted to holding a battery by screws or a housing for holding the battery or batteries.

simultaneously. The article includes a switch which is selectively operative to provide the 4-way flashing action, an indicator light, a capacitor connected across the switch terminal, and a fuse in series circuit with the switch. These elements are disposed in a housing which is adapted for mounting on the dashboard. The indicator light is made up of a red jeweled lens on the housing cooperating with a lamp bulb in a socket disposed within the housing. The socket of the indicator light is so wired that, when the 4-way switch is on, the light flashes simultaneously with the front and back signal lamps. When the 4-way switch is off, the indicator light is in circuit through the brake light switch of the automobile so as to indicate when that switch is closed.

Plaintiff's contention that the merchandise was "more than" a switch was predicated upon the indicator light. The trial court rejected the plaintiff's "more than" argument, stating (64 Cust. Ct. 323, 330, C.D. 3998 (1970)):

> It is apparent from the record that [the merchandise] was designed to function primarily as a switch. Indeed [it] is even described as a "Flasher switch" on the installation and operation instruction card which accompanied it * * *. The fact that [it] monitors the brake light switch and has other features and functions is, in the court's opinion, merely incidental to the primary function of the electrical switch. It is, therefore, not more than a switch. * * *

In reversing the trial court's judgment, the appellate court commented (59 CCPA at p. 18):

> We disagree with the court that the function of the indicator light, in particular the function of monitoring the operation of the brake light switch, is merely incidental to the switching function of the merchandise. *The indicating light structure and its circuitry take no part in the switching function. These elements were specifically designed to add additional functions to the merchandise which are significantly different from the switching function. Thus, the merchandise is more than an apparatus for making or breaking electrical circuits.* [Emphasis added.]

In the second *Fedtro* case, articles comprising a combination battery charger and battery tester for small dry cell batteries were classified by the Government as "rectifying apparatus" pursuant to item 682.60, TSUS. The Government contended that the merchandise was primarily a rectifying apparatus (a battery charger), and that the testing feature (a light bulb with its related circuitry), which performed no rectifying function, was an incidential or auxiliary feature. The importer argued that the dual function articles were "more than" rectifying apparatus, and that they were properly dutiable under item 688.40, TSUS.

In *Fedtro*, this court found that there were circumstances where the testing feature would be utilized but the charging feature would not be utilized. Moreover, paraphrasing a portion of the appellate court's opinion in the *Fedtro* case involving the automobile flasher switches (59 CCPA at p. 18), this court determined that: "The [testing] light structure and its circuitry take no part in the [rectifying] function. These elements were specifically designed to add [an] additional function to the merchandise which is significantly different from the [rectifying] function. Thus, the merchandise is more than [a rectifying apparatus]".

The facts in the present case are analogous to those in the two *Fedtro* cases discussed *supra*. There are obviously emergency situations in which the signal-warning portion of the imports would be useful, irrespective of whether the searchlight portion was used. Again, it is emphasized that the signal-warning bulb, socket, lens, wiring, contacts, switches and other elements take no part in the searchlight function of the lanterns. The signal-warning apparatus clearly adds an additional feature to the merchandise, which is significantly different from the searchlight function. Thus, following the rationale of the two *Fedtro* cases, these imports are more than portable electric lamps, as provided for in item 683.80.

And see also the decision in *Pollard Bearings Corporation* v. *United States*, 62 CCPA 61, C.A.D. 1146, 511 F. 2d 568 (1975), wherein the appellate court recently reiterated the principle that merchandise which in fact constitutes more than a particular article is not classifiable as that article. In *Pollard*, the court held that certain bearings were more than parts for water pumps since the bearings also served an additional important function in rotating the automobile's fan. The appellate court held that "the weight of the evidence clearly establishes that the imported bearings do not have one primary use or function, but rather have a dual primary function—supporting and rotating both the fan and water impeller—which renders the imported bearings 'more than' parts for water pumps [footnote reference omitted]". Similarly, in the present case, it is clear from the exhibits and testimony that the blinker lanterns "do not have one primary use or function, but rather have a dual primary function"—searchlight and signal-warning flasher.

Defendant principally relies upon *Continental Exchange, Ltd.* v. *United States*, 60 Cust. Ct. 233, C.D. 3333, 281 F. Supp. 892 (1968) as dispositive of the issue in the present case. In *Continental*, the merchandise comprised a small rechargeable flashlight with a red blinking light. The articles were classified under item 683.70 as

"Portable electric lamps with self-contained electrical source, and parts thereof: Flashlights and parts thereof". Plaintiff claimed that the merchandise was more than a flashlight and properly dutiable under either item 685.70 or 683.80. On cross-examination, the plaintiff's witness admitted that the article had imprinted on it "Rechargeable Flashlight", and that it was narrower and longer than a package of cigarettes, could be carried in one's pocket or purse, and could be used to find a keyhole in a door at night, or searching for something in a purse. In sustaining the classification under item 683.70, the court held, *inter alia*, that the articles were primarily flashlights, finding no convincing evidence that the blinking red light was used or effective as a signalling light; and that since flashlights are not "lamps" within the common meaning of the term, they were not properly classifiable under item 683.80 as "Portable electric lamps with self-contained electrical source, and parts thereof: Other".

In the present case, however, observation and operation of the samples themselves, including turning on the signal-warning flasher of a representative sample (exhibit 6) outdoors at night, demonstrate to my satisfaction the potential usefulness of the "blinker" lanterns to motorists and others as a signal-warning apparatus in emergency situations. In this respect, expert testimony is not required, and I find the probative effect of the samples sufficient here.

It is, of course, fundamental that samples are potent witnesses and may have great probative effect—"a principle long acknowledged by this court and the Court of Customs and Patent Appeals" (see *Oxford*, *supra*, 70 Cust. Ct. at p. 223, and appellate court authorities cited).

Moreover, this court may take judicial notice that blinker lanterns, such as those before the court, are widely promoted and sold in automotive, camping and other retail outlets as devices which may be used for their signal-warning function as well as their illuminating function. It is common knowledge that in emergency situations on the highway the signal-warning flasher component of the blinker lanterns is frequently used by motorists. Under all of the facts and circumstances, I find uncreditable the testimony of defendant's witness that the signal-flasher component would be "next to useless" to a motorist at night for emergencies on the road (R. 201–202).

In short, the blinker lanterns in the present case are of a substantially different size and design than the small purse size flashlights in *Continental*, and the signal-warning flasher is a significant feature of the instant imports. Therefore, I have concluded that the *Continental* holding is not dispositive in the present case.

Defendant also asserts that *Astra Trading Corp.* v. *United States*, 56 Cust. Ct. 555, C.D. 2703 (1966), supports its position. There, the court held that a screwdriver with a flashlight component for illumination was not more than a screwdriver due to the presence of the illuminating feature. Respecting the "more than" issue, the court commented (56 Cust. Ct. at p. 561):

> The decision in *United States* v. *A. W. Fenton Company, Inc.*, 49 CCPA 45, C.A.D. 794, cited by plaintiff, is distinguishable. In that case, the imported article contained a motor which also embodied gears and a frame which served as a housing for other parts of the floor polisher. The additional features made the article more than a special type of a motor since it formed part of the assembly of the floor polisher. *The rationale of the A. W. Fenton decision, supra, would be applicable herein if the record showed that the article had a use in addition to its use as a screwdriver.* However, plaintiff's own witness, when questioned as to the purpose of the importation, stated, without qualification, that the article was "designed specifically to be used as an illuminated screwdriver," and "the purpose of this entire item is to be used as a screwdriver * * *."
>
> * * * We do not believe that the additional feature of illumination transforms the basic purpose of the imported article from use as a screwdriver into some other use; *nor do we believe that the illuminating feature gives the article a use in addition to its intended use as a screwdriver.* For, illumination notwithstanding, the article remains essentially a device restricted to the use of turning screws, i.e., a screwdriver. * * * [Emphasis added.]

Significantly, the illuminated screwdriver in *Astra* was designed to perform a single function—turning screws—and the illuminating feature merely assisted or facilitated the screw turning function.

Parenthetically, in the recent decision, *United States* v. *Oxford International Corp.*, 62 CCPA 102, C.A.D. 1154, 517 F. 2d 1374 (1975), our appellate court similarly held that a rearview bicycle mirror was not more than a mirror with frames or cases within the purview of item 544.51 by virtue of its mounting bracket, since the bracket merely facilitated the use of the article as a mirror. In alluding to the many cases wherein the "more than" doctrine was applied, the appellate court observed that "in each [case] there was a *second significant function* in the importation justifying the application of the 'more than' doctrine." (Emphasis added.)

Here, the signal-warning flasher is "a second significant function in the importation justifying the application of the 'more than' doctrine". Unlike the illuminated screwdrivers in *Astra* and the bicycle mirrors in *Oxford*, the blinker lanterns perform dual and independent functions, neither of which assists or facilitates the other. Hence, while the facts in the present case are readily distinguishable

from those in *Astra* and *Oxford*, the *rationale* of those cases supports the conclusion reached herein.

Remington Rand Div. of Sperry Rand Corp. v. *United States*, 51 CCPA 57, C.A.D. 837 (1964), relied upon by defendant, is also distinguishable from the present case. There, the question was whether the rechargeable feature of certain flashlights made the articles more than flashlights for purposes of classification under paragraph 353 of the Tariff Act of 1930. In rejecting plaintiff's "more than" contention, the appellate court held that rechargeable flashlights fall within the definition of "flashlight", and distinguished *United States* v. *Sydney Kann & Co.*, 20 CCPA 77, T.D. 45702 (1932), as follows (51 CCPA at p. 60):

> * * * Thus, in *United States* v. *Sydney Kann & Co.*, 20 CCPA 77, T.D. 45702, this court held that a mechanical pencil having in its top portion a cigar or cigarette lighter was not a pencil. The court found that it was a "combination article," which seems to indicate that the item was something more than either a mere pencil or a mere lighter. At any rate, in our opinion the instant case and *Sydney Kann* are readily distinguishable. *A pencil and a cigarette lighter independently perform wholly different functions, and the combination of the two in no way affects the functioning of either of them.* On the other hand, a recharging network in a flashlight equipped with rechargeable batteries is, in a very real sense, integrated with the flashlight, and thus is as much a part of the flashlight as are the lens, bulb and other components referred to in the *Tower* case. The unit as a whole is imported, sold and used as nothing more than a particular kind of flashlight. Cf. *Biddle Purchasing Co.* v. *United States*, 50 CCPA 71, C.A.D. 823. [Emphasis added].

Since in the instant case, the searchlight and the signal-warning flasher components of the blinker lanterns "independently perform wholly different functions, and the combination of the two in no way affects the functioning of either of them", the blinker lanterns are analogous to the combination pencil and cigarette lighters in *Kann*, but are not analogous to the rechargeable flashlights in *Remington Rand*, the latter performing solely the function of a flashlight. It is an undisputed fact that basic portable lanterns, such as plaintiff's exhibit 2 and defendant's exhibit E1, do not include any emergency signal-warning component. Plainly, then, the addition of the signal-warning flasher function, which function is not essential to a basic portable electric lamp, makes the merchandise "more than" the articles covered by item 683.80.

Additionally, defendant's effort to obfuscate the distinction urged by plaintiff between the "illumination" and signal-warning flasher functions of the blinker lanterns is not supported by the testimony of defendant's expert, Brindley, who stated on cross-examination (R. 179):

Q. Now will you tell this court, please, with respect to function, how many functions does that article [exhibit 1] have?—A. Two, sir.

Q. Would you tell the court what these functions are?—A. Illuminating and flashing.

Q. Are they separate functions?—A. Insofar as they have separate switches and they are powered by separate bulbs, yes.

And at R. 181:

Q. Now, sir, will you tell this court, from the functional point of view, how many functions are there to that item [exhibit 19]?—A. Two.

Q. Will you tell the court what the two functions are?—A. Illuminating and blinking.

And at R. 185:

Q. Now how many functions does that item [exhibit 18] perform?—A. Well, it has a four-position switch, if you want to include "off". It has an illuminating switch, a switch which allows both the blinking function and the illuminating function to occur simultaneously, and it has a switch to allow *the separate blinking function.* [Emphasis added.]

Q. Does the blinker function depend upon the lantern function, sir?—A. Well, the way the switch is designed, you have to go through the lantern function before you get to the blinker function.

Q. Would you look at it and answer the question if you would?—A. I would say in all honesty these are quite independent.

Finally, differentiating between a "design standpoint" and a "functional standpoint", defendant's witness opined that "[f]rom a design standpoint, the blinker is *definitely* more important", while from a functional standpoint he *"believed"* that the illuminating section is more important (R. 201).

I have carefully considered the testimony of the witnesses, the numerous exhibits, and the prior holdings of this court and our appellate court concerning the "more than" doctrine. Predicated upon all of the foregoing considerations, I am clear that the "blinking" lanterns with a signal-warning flasher are "more than" the portable electric lamps provided for in item 683.80, as contended by plaintiff. Consequently, I find no merit in defendant's argument that the imports are nothing more than a "form" of portable electric lamp within the purview of the *eo nomine* provision therefor in item 683.80. Since the imports are electrical articles not specially provided for, they are properly dutiable under item 688.40. The protests are sustained, and judgment will be entered accordingly.

(C.D. 4644)

THE KANTHAL CORPORATION *v.* UNITED STATES

Wire rods—Wire

The testimony establishes that the imported merchandise, in the condition imported, is a product processed from billets, hot-rolled into wire rod approximately 7 millimeters in diameter, and next drawn, one time, through a die 0.204 inch in diameter. After importation the imported products are placed in an inventory pending further processing by drawing into wire of whatever size specified by a customer in the United States.

Defendant's witnesses testified that in the steel industry of the United States the term "process wire" refers to unfinished or partly finished wire that is placed in inventory for further processing by drawing, and includes wire rod that has been drawn one time.

For the purposes of TSUS wire rod is *inter alia* a semifinished hot-rolled product and wire is *inter alia* a finished drawn product.

Testimony that "process wire" is wire and includes a product that is drawn one time but unfinished is irreconcilably at odds with the tariff definition of wire as a finished drawn product.

Such testimony does not warrant a finding that the imported products consist of wire, merely because drawn. *C. J. Tower & Sons (Buffalo)* v. *United States*, 48 Treas. Dec. 636, Abs. 49897 (1925). Factually, the imported products while they might be described as "process wire" are a hot-rolled product and, drawn one time but still to be further processed by additional drawing, are semifinished rather than finished.

The fact that the TSUS definition essentially incorporates the judicial construction given the term "wire rods" in the *Tower* case or, at very least, is not at odds with the judicial construction of the term, is indeed some indication that Congress approved the *Tower* decision. *United States* v. *Curley-Bates Co.*, 46 CCPA 14, C.A.D. 688 (1958); *United States* v. *Great Pacific Co., Shui Tai & Co.*, 23 CCPA 319, T.D. 48192 (1936).

HELD. The imported products are properly dutiable, as claimed, under TSUS item 608.78 as wire rods rather than under TSUS item 609.45 as round wire, as classified.

Court Nos. 68/4195, etc.

Port of Bridgeport

[Judgment for plaintiff.]

(Decided April 1, 1976)

Barnes, Richardson & Colburn (*James Caffentzis* and *Rufus E. Jarman, Jr.*, of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis*, trial attorney, and *Andrew P. Vance*, Chief, Customs Section), for the defendant.

LANDIS, Judge: The overriding question in these cases, consolidated for trial,[1] is whether certain metal products imported from

[1] There are thirty consolidated cases.

Sweden during the period 1966–1970, are "wire rods," of alloy iron or steel, tempered, treated or partly manufactured, as contended by plaintiff under TSUS item 608.78, or were properly classified by customs as "round wire" of alloy iron or steel, under TSUS item 609.45, as modified by T.D. 68–9.[2]

Wire rod and round wire, which are the subject of this controversy between the parties, are provided for in TSUS schedule 6, part 2, subpart B. Part 2 and subpart B of schedule 6 contain special rules of interpretation and define important terms, in pertinent part, as follows:

SCHEDULE 6. – METALS AND METAL PRODUCTS

PART 2. – METALS, THEIR ALLOYS, AND THEIR BASIC SHAPES AND FORMS

* * * * * * *

Subpart B. – Iron or Steel

Subpart B. headnotes:

1. This subpart covers iron and steel, their alloys, and their so-called basic shapes and forms, and in addition covers iron or steel waste and scrap.

* * * * * * *

3. Forms and Condition of Iron or Steel.—For the purposes of this subpart, the following terms have the meanings hereby assigned to them:

* * * * * * *

(f) Wire rods: A coiled, semifinished, hot-rolled product of solid cross section, approximately round in cross section, not under 0.20 inch nor over 0.74 inch in diameter.

* * * * * * *

(i) Wire: A finished, drawn, non-tubular product, of any cross-sectional configuration, in coils or cut to length, and not over 0.703 inch in maximum cross-sectional dimension. The term also includes a product of solid rectangular cross section, in coils or cut to length, with a cold-rolled finish, and not over 0.25 inch thick and not over 0.50 inch wide.

Wire rod and round wire are classified under subpart B, in pertinent part, as follows:

	Wire rods of iron or steel:	
	* * * * * * *	
	Alloy iron or steel:	
608.76	Not tempered, not treated, and not partly manufactured----	* * *

[2] Duty was assessed at various rates ranging from 12.5 per centum ad valorem on importations prior to 1968 to 11 per centum ad valorem on importations in 1970.

608.78	Tempered, treated, or partly manufactured	0.375¢ per lb. +4% ad val. + additional duties (see headnote 4)
* * * * * * *		
	Wire of iron or steel:	
* * * * * * *		
	Round wire:	
* * * * * * *		
609.45	Alloy iron or steel	[Various rates depending on dates of importation] + additional duties (see headnote 4)

The pleadings filed by both sides concede that the imported products were imported in a coiled form; that they are of solid cross section, and that they are not under 0.20 inch nor over 0.74 inch in diameter. To that extent, the imported products meet the specifications, both for "wire rods," and "wire." [3] Defendant has denied plaintiff's allegations that the imported products are definitionally "approximately round," "semi finished," "hot-rolled," wire rod.

On trial, plaintiff adduced testimony from three witnesses in its employ and introduced four illustrative exhibits in evidence. Exhibit 1 is a physical sample of the imported products in the condition imported which, as the record attests, is a hot-rolled product drawn one time through a die. Exhibits 2, 3, and 4 are physical samples of resistance (electrical) wire which plaintiff processed (by further drawing) in the United States from products in the condition of the imported products (exhibit 1). Defendant also produced three witnesses, adduced their testimony, and introduced four exhibits in evidence. Exhibit A is a physical sample of a hot-rolled wire rod, not drawn; exhibit B is a metal die with an opening 0.204 inch in diameter for drawing wire rod or wire, and exhibit C is a physical sample of a product produced by cold-drawing exhibit A through the metal die (exhibit B). Exhibit D is a booklet published by the public relations department of the American Iron and Steel Institute entitled "Steel

[3] *Wire not over 0.703 inch in maximum cross-sectional dimension is obviously not over 0.74 inch in diameter.*

Processing Flow Charts." Its evidentiary value is limited to the schematically pictured processes (excluding the accompanying text) depicted on the pages entitled "Steel Rods and Wire Made From Them." So far as I can discern, the material and relevant facts, next summarized, are not in dispute.

The imported products, in the condition imported, were processed from billets, hot-rolled into wire rod approximately 7 millimeters in diameter. After hot-rolling, the wire rod was drawn, *one time*, through a die 0.204 inch in diameter to produce the imported products in the condition shipped to the United States.

On plaintiff's side, it was testified that the purpose of drawing the wire rod one time was to select material without cracks for shipment. As one witness stated, if the hot-rolled material was shipped without being drawn one time, the percentage of scrap to the importer would increase and the importer had no facilities to melt the scrap. "Also, transportation costs across the ocean would be larger because of the higher volume that would be required to transport it over here in order to get the same amount of finished product."

The imported products are held in plaintiff's inventory. As orders are received from customers, the imported products are removed from inventory and further drawn in the United States to wire of whatever size specified by the customer. After the final drawing, to the size specified by the customer, the wire is annealed and inspected to determine that it meets the customer's requirements for roundness and quality.

Plaintiff on several occasions, did sell selected small quantities of the imported products without further processing to accommodate customers in unidentified emergency situations. The imported products are not, however, usually offered or sold in the United States in the condition imported.[4]

Plaintiff's first witness Erik Hagglund was of the opinion that the imported products were semifinished because they were unsuitable to be used as a finished product until reprocessed by drawing into finished wire of finer sizes. As explained by one of plaintiff's witnesses, importations fall into two categories, finished material and reprocessing material. Finished material is imported on order from a specific customer and the material is immediately unpacked and checked by plaintiff's quality control department. Reprocessing material is stored without being unpacked or checked until it is released to the production department as required. Any defects in the reprocessing material show up during the drawing operation, which is one of the reasons why the hot-rolled product is drawn one time before importation.

[4] At the close of plaintiff's evidence, defendant moved to dismiss the case on the ground that *prima facie*, the evidence did not support plaintiff's claims. In view of the result reached in this decision, the motion is denied.

Defendant's witnesses testified that the term "semifinished" identifies a product held in inventory for further processing; that it refers to everything that is a hot-rolled product down to and including hot-rolled rod, and that in the steel industry the term "semifinished" refers only to hot-rolled products at some stage in the sequence of production steps. Finished wire, according to defendant's witnesses, is wire that is in a condition that it can be sold to a customer and wire that is drawn to give it that degree of concentricity that it can be used to fabricate an article, if it is not desired to further process (draw) it into other sizes. One of defendant's witnesses testified that the term "finished" was not used in the stainless steel industry. Defendant's witnesses were firm in their opinions that, in the steel industry, once wire rod passes through a die (i.e. is drawn one time), it becomes wire.

When asked what the term "process wire" meant in the steel industry, it was stated that the term referred to "unfinished" or "partly finished" wire held in inventory for further processing; that the term included wire that had been drawn one time, and means "anything that's not a finished product."

There is also testimony that the imported products are "round" even though from an engineering standpoint perfect roundness is impossible to achieve. No witness was able to demarcate a point that would distinguish a "round product" from an "approximately round" product and it was left as a matter of degree.

Defendant has mustered several points which it argues support its position that one drawing is definitionally sufficient to change hot-rolled wire rod into finished drawn round wire. One point is grounded on the testimony defendant adduced that in the steel industry wire rod becomes wire at the point that it is drawn through a die the first time. However, in *C. J. Tower & Sons (Buffalo)* v. *United States*, 48 Treas. Dec. 636, Abs. 49897 (1925), similar testimony adduced by defendant to support classification of certain wire as "round wire" rather than as "wire rods" was relevantly rejected and the wire held dutiable as "wire rods" for the following stated reason:

> We do not believe that the testimony herein offered by the Government warrants a finding of fact that this merchandise consists of wire, merely because it has been drawn. We deem it safer to follow the congressional view that there are rods which are cold-drawn, and that such drawing does not of itself make the rods dutiable as wire. At least, before nullifying a specific provision for such rods, positive testimony of the most convincing character should be submitted establishing as a fact that there exist no such rods in the trade and commerce of this country. The present record contains proof that there are such rods, and that the merchandise in question is of that class. [Page 637.]

[See also, *E. Dillingham, Inc.* v. *United States*, 49 Cust. Ct. 34, C.D. 2357 (1962).]

Defendant's additional points are not arguably persuasive. The testimony that it is impossible to achieve perfect roundness in wire undercuts the substance of defendant's point that the imported products are not definitionally "approximately round." Material cited by defendant relevant to the classification of wire rods under paragraph 315 of the 1930 Tariff Act, if anything, makes a stronger case for classifying the imported products as wire rod than as round wire. *C. J. Tower & Sons (Buffalo)* v. *United States, supra.*

As in *Tower, supra*, the opinion testimony in this case is also divided on the question of whether the imported products drawn one time are "wire rods" as claimed or "round wire" as classified. The definition of "wire" in TSUS definitively refers to a finished drawn product. This record preponderantly establishes that the imported products are not finished drawn because they are held in the importer's inventory for further processing by drawing in the United States. In fact, defendant's witnesses testified that wire held in inventory for further processing by drawing is known in the industry as "process wire." It is not a "finished product." As to the understanding in the steel industry, it is stated:

> * * * As soon as a rod has been given a draft [the operation itself is called drawing], it is thereafter designated as a wire, though many more drafts and various other treatments may be necessary to work it into wire of the size, finish and temper desired. In wire-drawing plants, any wire which, following the initial drawing from the rod, is to receive further work or treatment before it is finished is designated as *process wire*. After the first draft from the rod, process wire may be finished in various ways. [*The Making, Shaping and Treating of Steel*, U.S. Steel Corp., 8th ed., page 783 (emphasis quoted).]

For the steel industry to say that "process *wire*" is wire and includes a product that is drawn one time but unfinished strikes me as irreconcilably at odds with the statutory definition that, for the purposes of TSUS, "wire" is a finished drawn product. Factually, I am of the opinion that while the instant importations fit the commercial description of "process wire," they are in fact a hot-rolled product that has been drawn one time and they must be further processed by additional drawing. I find and conclude, therefore, that the imported products are "semifinished" rather than "finished." As *inter alia* defined in TSUS, wire rods are semifinished hot-rolled products. The fact that the TSUS definition essentially incorporates the judicial construction given the term "wire rods" in the *Tower* case or, at very least, is not at odds with the judicial construction of the term, is

indeed some indication that Congress approved the *Tower* decision. *United States* v. *Curley-Bates Co.*, 46 CCPA 14, C.A.D. 688 (1958); *United States* v. *Great Pacific Co., Shui Tai & Co.*, 23 CCPA 319, T.D. 48192 (1936).

For the reasons stated, I am brought to follow the *Tower* decision. Accordingly, I hold that the imported products are properly dutiable under TSUS item 608.78 as wire rods, of alloy iron or steel, tempered, treated or partly manufactured.

Judgment will enter accordingly.

(C.D. 4645)

ECONOMY COVER CORP. *v.* UNITED STATES

Rubber and plastic products

Plastic covers used as protective coverings for clothes were properly classified as articles not specially provided for, of rubber or plastics, under item 774.60 of the tariff schedules, dutiable at the rate of 8.5 per centum ad valorem, and not under item 772.35 where plaintiff claimed they were more specifically provided for by the term "like furnishings." Notwithstanding their ostensible similarity with articles specifically enumerated in item 772.35, the importations did not possess the essential characteristics or purpose common to all the articles enumerated *eo nomine* in that schedule and, therefore, were not *ejusdem generis* (of the same kind or class) with them. Although used as protective coverings, the plastic covers were designed to be used for clothing and not on articles or furnishings associated with a home or place.

EJUSDEM GENERIS

When general words in a statute follow a specific enumeration of persons or things, the general words are not to be construed in their widest sense or meaning, but rather are to be limited, or held to apply, only to persons or things of the same kind or class as those specifically enumerated.

Court No. 75-1-00253

Port of New York

[Judgment for defendant.]

(Decided April 6, 1976)

Shaw and Stedina (*Charles P. Deem* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Robert E. Silverman*, trial attorney), for the defendant.

RE, Judge: The question presented in this case pertains to the proper classification, for customs purposes, of certain merchandise

exported from Hong Kong and Taiwan, and entered at the port of New York. The merchandise from Hong Kong is described as "plain polyethylene suit covers," and that from Taiwan as "crystal transparent covers." Both the suit covers, commonly known as overlap covers, and the transparent covers, known as shoulder covers, are plastic covers used as protective coverings for clothing. Since there is no genuine factual issue to be tried, the parties, pursuant to rule 8.2 of the rules of this court, have moved for summary judgment.

The merchandise was classified as "[a]rticles not specially provided for, of rubber or plastics," under item 774.60 of the Tariff Schedules of the United States [TSUS], as modified by Presidential Proclamation 3822, T.D. 68–9, and was consequently assessed with duty at the rate of 8.5 per centum ad valorem.

Plaintiff contests that classification, and claims that the merchandise is more specifically provided for in item 772.35 TSUS, as modified, *supra*, and therefore should have been assessed with duty at the rate of 6 per centum ad valorem.

For purposes of convenience the competing provisions of the tariff schedules may be set forth as follows:

Classified:		
	"Articles not specially provided for, of rubber or plastics:	
	* * * * * * *	
774.60	Other	8.5% ad val."
Claimed:		
772.35	"Curtains and drapes, including panels and valances; napkins, table covers, mats, scarves, runners, doilies, centerpieces, antimacassars, and furniture slipcovers; and like furnishings; all the foregoing of rubber or plastics	6% ad val."

It is clear that the overlap and shoulder covers are not a form of any of the articles specifically set forth *eo nomine* in item 772.35. Plaintiff, nevertheless, moves for summary judgment because it claims that they are embraced by the words "like furnishings" in item 772.35.

The defendant contends that since the plastic clothes covers are not *ejusdem generis* with the articles enumerated in item 772.35, they are not "like furnishings," and were properly classified. Defendant, consequently, cross-moves for summary judgment sustaining the classification, and denying plaintiff's motion.

Since there is agreement as to the nature and purpose of the protective plastic covers, the question presented is whether they were

properly classified, as claimed by defendant, or whether they are "like furnishings" within item 772.35, as claimed by plaintiff.

It is the determination of the court that the overlap and shoulder covers are not *ejusdem generis*, i.e., of the same kind or class, as the other articles specifically enumerated in item 772.35. Since they are not "like furnishings," within the intendment of that item, plaintiff's claim must fail.

The doctrine of *ejusdem generis*, as an aid in the construction of statutes, is utilized frequently in the consideration of the tariff laws of the United States. It is a specific application or illustration of the broader maxim *noscitur a sociis*, i.e., known by its associates. This maxim is designed to teach that the meaning of a word may be known or revealed by the words with which it is accompanied or associated. Hence, when general and specific words are associated, not only may their meaning be gleaned from each other, but also, the meaning of the general words may be limited or restricted to the sense or category of the specific words.

In essence, *ejusdem generis* means that when general words in a statute follow a specific enumeration of persons or things, the general words are not to be construed in their widest sense or meaning, but rather are to be limited, or held to apply, only to persons or things of the same kind or class as those specifically enumerated.

An examination of the specifically enumerated articles preceding the words "like furnishings," in item 772.35 of the schedules, reveals that the plastic clothing covers at bar are not of the same class or kind. Notwithstanding their ostensible similarity they do not possess the essential characteristic or purpose which is common to the articles enumerated *eo nomine*.

Much ground has already been covered by the prior decisions in this area, and only a few broad markers need be highlighted. See *Venetianaire Corp. of America* v. *United States*, 60 CCPA 75, C.A.D. 1084, 470 F. 2d 1047 (1973); *Venaire Shade Corp.* v. *United States*, 66 Cust. Ct. 469, C.D. 4235 (1971); *Joanna Western Mills Company* v. *United States*, 64 Cust. Ct. 218, C.D. 3983, 311 F. Supp. 1328 (1970); *Kotake Co., Ltd., American Customs Brokerage Co.* v. *United States*, 58 Cust. Ct. 196, C.D. 2934, 266 F. Supp. 385 (1967).

Research as to the meaning of the words "like furnishings" may conveniently commence with the case of *Morimura Bros.* v. *United States*, 2 Ct. Cust. Appls. 181, T.D. 31941 (1911). In the *Morimura* case, the appellate court distinguished "furniture," "house furniture" and "house furnishings," as follows:

> "The term 'furniture' as ordinarily used may mean that with which anything is furnished, supplied, or equipped. House furni-

ture has a restricted signification, however, which does not cover everything with which a house may be furnished, supplied, or equipped. House furniture, in these modern times, has come to denote those articles of household utility which were formerly made of wood and which are designed for the personal use, convenience, and comfort of the dweller. House furnishings, on the other hand, are the subsidiary adjuncts and appendages of the house, designed for its ornamentation or which are of comparatively minor importance so far as personal use, convenience, and comfort are concerned." 2 Ct. Cust. Appls. at 182.

The case of *Sprouse Reitz & Co., Frank P. Dow Co., Inc.* v. *United States*, 67 Cust. Ct. 209, C.D. 4276, 332 F. Supp. 209 (1971) refers to some of the meanings of the noun "furniture" under the various tariff acts, and the cases that have construed the term.[1] Although it has been stated that the term "furniture" is one of "broad signification" (*Necchi Sewing Machine Sales Corp. et al.* v. *United States*, 30 Cust. Ct. 1, 3, C.D. 1489 (1952)), under the Tariff Act of 1930 "house furnishings" remained limited to articles of ornamentation. See *Furniture Import Corp.* v. *United States*, 56 Cust. Ct. 125, C.D. 2619 (1966); *Fabry Associates, Inc.* v. *United States*, 45 Cust. Ct. 88, C.D. 2203 (1960).

In 1970, in the *Joanna Western Mills* case, this court noted that the words "like furnishings," in item 772.35 of the tariff schedules, were new, and that prior cases, decided under the Tariff Act of 1930, were not dispositive of their meaning. The court, construed the word "furnishings" in the light of the new enactment, and concluded that, "when used in the tariff schedules, [it] cannot be limited on the basis of the presence or absence of ornamentation." Basing its construction also on other provisions of the tariff schedules, and the case of *Barth & Dreyfuss* v. *United States*, 62 Cust. Ct. 86, C.D. 3685 (1969), the court found that Congress has indicated that furnishings "may be ornamented as well as unornamented." 64 Cust. Ct. at 236.

In the *Barth & Dreyfuss* case, plaintiff claimed that terry cloth potholders were "like furnishings" under item 366.65 of the tariff schedules. The pertinent headnote provided that "the term 'furnishings' means curtains and drapes, including panels and valances; towels, napkins, tablecloths, mats, scarves, runners, doilies, centerpieces, antimacassars, and furniture slipcovers; and like furnishings * * *." Plaintiff maintained that the potholders were "furnishings" *ejusdem generis* with, and "of the same class and character" as the towels, napkins, etc. enumerated in the pertinent headnote. After the receipt of plaintiff's post-trial brief the defendant conceded the

[1] The *Sprouse Reitz* case, though not appealed to the Court of Customs and Patent Appeals, was inferentially affirmed in *Albert E. Price, Inc.* v. *United States*, 60 CCPA 127, C.A.D. 1095, 476 F. 2d 1354 (1973)

correctness of plaintiff's contention, and requested that it be relieved of filing a brief. The court agreed that plaintiff's argument was "well taken," and held that the potholders were "like furnishings" "*ejusdem generis* with the towels, place mats, napkins, and dish towels enumerated" in the provision for "furnishings."

The merchandise in the *Joanna Western Mills* case consisted of plastic window shades on wooden rollers. The classification question presented was whether the window shades had been properly classified as "[c]urtains and drapes * * * and like furnishings," under item 772.35. An examination of the definitions of shades, curtains and drapes, not only revealed their similarity, but also that the articles "share[d] a common purpose or function in concealing, screening and controlling light." Since the window shades were used as "window coverings to provide privacy and light control," the court found that they were "*ejusdem generis* with curtains and drapes." 64 Cust. Ct. at 237. The court, therefore, held that the window shades were "like furnishings" within item 772.35.

In its brief in support of its motion, plaintiff refers to the broadness of the term "furnishings," and states that "it cannot be seriously argued that the shoulder and overlap covers" are "within the common meaning of the term furnishings." The question presented, however, is not whether the shoulder and overlap covers are "furnishings" for the statutory provision does not read "and other furnishings."

The claimed provision specifically enumerates *eo nomine* about a dozen furnishings, and includes "and *like furnishings*." (Emphasis added.) The provision, therefore, offers a classic example for the proper application of the doctrine of *ejusdem generis*. Hence, proof that articles are "furnishings" is insufficient to establish that they are "like furnishings" within the tariff provision. The proof must establish that they are of the same kind and class as those specifically enumerated. For example, in the *Joanna Western Mills* case, the window shades were not merely held to be "furnishings." They were held to be "like furnishings," i.e., of the same kind and class as "curtains and drapes," articles specifically enumerated in the tariff provision.

Plaintiff invokes the customs law principle that, whenever imported merchandise is covered in two or more tariff provisions, it is to be classified under the one that describes it most specifically. Therefore, it maintains that since the overlap and shoulder covers have been classified under a general or "basket" provision, they should have been classified under the more specific provision for "furnishings."

The cited principle of relative specificity is not in issue, only its applicability. For example, it is basic that if merchandise is specified *eo nomine*, the *eo nomine* provision prevails over one that is general or less specific. The principle is of such importance and frequent applica-

tion that it is codified in General Interpretative Rule 10(c) that provides:

> "an imported article which is described in two or more provisions of the schedules is classifiable in the provision which most specifically describes it; * * *"

This approach, however, is circuitous for the merchandise is not specified *eo nomine* in the claimed provision, and the question presented remains whether it constitutes "like furnishings."

Plaintiff stresses the "likeness" of the plastic overlap and shoulder covers to table covers, furniture covers, mattress covers and pillow covers, and concludes that they are "like furnishings" within item 772.35. The "likeness" test, as suggested by plaintiff, would result in an expansion of the category beyond the legislative intent. The "likeness" must have reference to, and is limited by, the particular category, i.e., the kind or class of the enumerated articles. As stated by this court in *Kotake Co., Ltd., et al.* v. *United States*, 58 Cust. Ct. 196, 199, C.D. 2934, 266 F. Supp. 385 (1967), "[e]*jusdem generis* means literally 'of the same kind.'" Note also the case of *Venaire Shade Corp.* v. *United States*, 66 Cust. Ct. 469, 473, C.D. 4235 (1971) wherein plaintiff claimed that vinyl folding doors should have been classified under item 772.35 as "*curtain-like* furnishings." (Emphasis in original.) In overruling the protest, and sustaining their classification as unprovided for articles of plastics, this court held that the vinyl folding doors were "not *ejusdem generis* with 'curtains' and 'drapes' and [were], therefore, not 'like furnishings'." Since the doors were not of the kind or class enumerated in the claimed provision, they had been properly classified under the general provision covering unprovided for articles of plastics.

Plaintiff, in support of its motion, places great reliance on the case of *Venetianaire Corp. of America* v. *United States*, 60 CCPA 75, C.A.D. 1084, 470 F. 2d 1047 (1973). In substance, plaintiff submits that "applying the criteria of 'likeness' enunciated in the *Venetianaire* case, this Court should hold the imports to be describable as 'like furnishings' of plastics under item 772.35, TSUS." In the *Venetianaire* case the question pertained to the classification of plastic mattress covers and pillow covers which had been classified under item 772.15 as plastic household articles. In reversing this court, which had sustained the classification (67 Cust. Ct. 118, C.D. 4261 (1971)),[2] the Court of

[2] In sustaining the classification, the Customs Court relied in part on a Bureau of Customs ruling that, although the plastic mattress and pillow covers were protective covers, they were "not used on furniture," and were therefore not classifiable under item 772.35 but under item 772.15 as plastic household articles. Also the 1968 Summaries of Trade and Tariff Information stated that "mattress and pillow covers are among some of the more important articles of plastic housewares included under item 772.15 of the tariff schedules." 67 Cust. Ct. at 121-22. The appellate court likewise disagreed with the view that it had been the intent of Congress "to classify bedding separately from other furnishings."

Customs and Patent Appeals held that they were "like furnishings" under item 772.35. Although the mattress covers and pillow covers were not specifically enumerated in item 772.35, the appellate court indicated that they were "almost identical" to the "plastic table and furniture covers * * * exemplary of furnishings classified in item 772.35." 60 CCPA at 77.

Item 772.35 specifies *eo nomine* "table covers" and "furniture slipcovers," and it is significant that the appellate court stated that they "are all employed for like functions and purposes—namely, as protective coverings for the articles upon which they are used in the home." 60 CCPA at 78. The court quoted from the brief of the appellee the sentence that the "furnishings included in item 772.35, TSUS, are those commonly used *throughout the home*, either for decorative or protective purposes." *Ibid.* (Emphasis added.)

The statement of the appellate court, that the furnishings enumerated in item 772.35, are all used as protective coverings "for the articles upon which they are used *in the home*," emphasizes a basic characteristic that is common to each of the articles specifically enumerated in item 772.35 (emphasis added). Apart from the decorative or functional aspect of the articles, the concept of "furnishings" in the *Venetianaire* case does not differ from that of the *Morimura* case where the court described them as "adjuncts and appendages *of the house*." (Emphasis added.) 2 Ct. Cust. Appls. at 182.

An examination of the articles enumerated in item 772.35 will reveal that each one of them is used to enhance or protect other articles that are used in a home or household. Plaintiff, however, points out that the articles enhanced or protected "find use in furnishing places other than homes, such as hotels, motels, restaurants, ships, etc." It is clear, nonetheless, that they are all used on articles that furnish a *place* or a situs.

The articles enumerated in item 772.35 fall into a category with two subdivisions. The first consists of curtains, drapes, panels and valances. Clearly, these articles are appendages to a home, house or place, and it is not claimed that the overlap or shoulder covers belong to this group. The second subdivision covers: "* * * napkins, table covers, mats, scarves, runners, doilies, centerpieces, antimacassars, and furniture slipcovers." Since plaintiff claims that the overlap and shoulder covers are like table covers and furniture covers, it must contend that they are embraced in this second group.

The dictionary definitions of the enumerated articles make it clear that they are all articles used with furniture, or with other articles used in a home, to adorn or protect it, and enhance the room or place in which the articles are displayed or located. Defendant points out that even "napkins," used to wipe lips or fingers, also serve to enhance

the table with which they are used, thereby providing a more elaborate appearance for the room.

The affidavits submitted by plaintiff indicate that the overlap and shoulder covers are chiefly used as protective coverings for wearing apparel displayed for sale in retail stores, and to protect wearing apparel in storage. Unlike any of the other furnishings enumerated in 772.35, they are not used to adorn, protect or enhance adjuncts or appendages of a house, home, room, place or situs. They lack the one common characteristic which unites all of the furnishings enumerated in item 772.35. See *Kotake Co., Ltd., et al.* v. *United States*, 58 Cust. Ct. 196, 199, C.D. 2934, 266 F. Supp. 385 (1967).

Overlap and shoulder covers are designed and used to protect clothing rather than to protect or enhance a home or any other place or situs. The articles with which they are used are dissimilar to those specified in item 772.35. Differently stated, the imported articles are designed to be used for clothing, whereas all of those set forth *eo nomine* in item 772.35 are designed to be used on articles or furnishings associated with a home or place.

The imported overlap and shoulder covers do not ornamentally or functionally protect or enhance any home, house, place or situs, or any articles or furnishings used therein. They are, therefore, not "like furnishings" *ejusdem generis* with the articles specifically enumerated in item 772.35 of the tariff schedules.

In view of the foregoing, it is the determination of the court that plaintiff's motion for summary judgment is denied, defendant's cross-motion is granted, and the customs classification of the imported merchandise under item 774.60 of the tariff schedules is sustained.

Judgment will issue accordingly.

(C.D. 4646)

CALIFORNIA PROCESSED FRUIT CO. *v.* UNITED STATES

Dutiable weight

CHERRIES IN SYRUP—PRESERVATIVE AND PACKING MEDIUM—LACK OF COMMERCIAL VALUE

Cherries packed in syrup and imported in drums at Los Angeles-Long Beach, California from France, classified under TSUS item 154.05 and assessed at the rate of 7 cents per pound and 10 *per centum ad valorem* on the cherries and syrup *held* not subject to specific duty on the weight of the syrup where testimony of industry witnesses establishes that the syrup preserves the cherries and protects them from crushing during transportation, is discarded when the cherries

are removed for processing in the United States, and is not known to have any further commercial use. *United States* v. *E. W. J. Hearty, Inc.*, 31 CCPA 106, C.A.D. 257 (1943) followed.

Court No. 70/7296

Port of Los Angeles

[Judgment for plaintiff.]

(Decided April 7, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis* trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of cherries in syrup exported from France in drums on or about May 31, 1969, and classified in liquidation upon entry at the port of Los Angeles-Long Beach, California, under TSUS item 154.05 as glace fruits at the duty rate of 7 cents per pound and 10 *per centum ad valorem*. The only issue in the case is the proper dutiable weight of the imported merchandise. The total weight of cherries and syrup combined was utilized in the assessment of the specific rate of duty. It is alleged that the specific duty should be assessed only on the net weight of the cherries exclusive of any syrup or packing medium.

In the pleadings it is admitted that the merchandise consists of 100 drums of glace* cherries in syrup, and that the contents of each drum weighed 540 pounds.

Plaintiff's president, David Chorna, testified that he has been in the business of manufacturing and selling glazed fruits and peels since 1939, that he placed the order for the imported merchandise in this case, that he weighed the cherries and syrup in 10 percent of the imported drums and found that each 50-gallon drum contained 300 pounds of cherries and 240 pounds of syrup. As to the usage of the syrup in issue, the witness testified (R. 12):

> Q. You said you drained these drums and weighed the cherries, is that correct? A. Yes; it is.
>
> Q. After that had been done what did you do with these specific cherries? A. We took the syrup and put it back on the cherries. With the hundred drums of cherries?
>
> Q. Yes. A. They were shipped to the Bonbon Corp., which is a subsidiary of the Carnation Ice Cream Co.
>
> Q. Do you know whether or not the liquid in which these specific cherries arrived in the drums had any use? A. They did not have any use.

*The evidence reveals that the cherries are maraschino cherries which apparently were incorrectly invoiced as glace cherries.

After colloquy between the court and counsel at this point the witness further testified (R. 13–14):

> Q. Mr. Chorna, to your business, the California Processed Fruit Co., did that liquid in which these cherries arrived have any value? A. No; it did not.
>
> Q. Do you know what was done by the party to whom you sold these cherries with that syrup? A. Yes.
>
> Q. How do you know? A. I was there and saw it.
>
> Q. What did they do with the syrup? A. They put the syrup down a sewer.
>
> Q. Do you know whether or not in the processed fruit industry there is any trading, or is there any trading in the type of liquid that these cherries arrived in? A. Not to my knowledge.

The witness stated that the cherries in issue were used to make bonbons which are being sold at confectionery stands in theaters. Mr. Chorna also explained that a manufacturer of maraschino cherries would produce his own syrup in order to maintain quality control of his product, and would not utilize another manufacturer's syrup because its content would be unknown to him. The result is that there is no buying and selling of excess syrup solutions among the processed fruit manufacturers.

On the same subject of syrup usage, Adolph R. Asti, a food technologist who has been in the employ of S & W Fine Foods, wholesale grocers and food manufacturers, for 37 years [called on behalf of the Government] testified that he was one of the principals in developing a bubble spray system for making maraschino and glace cherries. On direct examination he testified (R. 58–59):

> Q. You have heard the testimony of Mr. Chorna here this morning in court, is that correct? A. Yes.
>
> Q. You also are familiar with the way that the cherries in issue in this case were packed, is that correct? A. That's right.
>
> Q. What, in your opinion, is the purpose of the syrup? A. The only purpose of the syrup in my opinion would be to prevent it from being crushed in transportation.
>
> Q. Could water have been used instead of syrup? A. Not to maintain the same product.
>
> Q. What would happen if you used water? A. Then you would be diffusing the sugar from the cherries and wouldn't have the same brix you started out with.

Whether or not the syrup in the drums in this case is dutiable turns upon the existence or non-existence of commercial value in this country for the syrup following its importation as a preservative and packing medium. *United States* v. *E. W. J. Hearty, Inc.*, 31 CCPA 106, C.A.D. 257 (1943). In the *Hearty* case the merchandise was chicken breasts packed in tins along with a gelatinous substance known as "zalivka" which surrounded the meat, as to which specific duty had been assessed against the entire contents of the tins. Upon

evidence furnished from users of the product to the effect that the gelatinous substance was merely a packing material which in commercial practice is discarded upon opening of the tins the trial court sustained the importer's protest against duty assessment on the gelatinous substance. Our appeals court was of the opinion that the evidence supported the conclusion of the trial court that the substance lacked *commercial value*, and affirmed the decision of the trial court. The appeals court said (p. 108):

> . . . As found by the court below, this record as a whole is quite convincing, we think, that in using the imported chicken breasts for chicken salad, chicken pie, and other dishes, which seemed to be its main uses, it was not feasible or practicable to utilize the 6 ounces of gelatinous substance in any manner, and that no practicable use for it was known.

The plaintiff-importer argues that the facts at bar are analogous to the facts in the *Hearty* case in that the syrup has no use other than as a preservative and packing medium for the cherries which is discarded after separation from the cherries. Defendant argues that the *Hearty* case is inapplicable here because the conclusion reached there was supported by the testimony of 7 witnesses, whereas here the conclusion urged by plaintiff is supported by the testimony of only 1 witness whose testimony must be characterized as weak and unconvincing.

In evaluating testimonial evidence it is not the number of witnesses who testify, but rather the quality of their evidence, which the court regards as being important for resolution of an issue of fact. In this case, not one, but both parties' witnesses have given uncontradicted evidence that the imported syrup has no commercial value in this country other than as a preservative and packing medium. And, in the court's view both witnesses, by virtue of their long experience and association in the processed fruit industry, are qualified to know the usage of the syrup in issue in the industry. Furthermore, the lack of commercial value is sustained by the fact that the syrup is discarded upon separation from the cherries. *Cf. Peabody & Co.* v. *United States*, 13 Ct. Cust. Appls. 80, T.D. 40935 (1925).

It is to be noted, however, that Mr. Asti stated that he had observed that the syrup of bottled maraschino cherries [to which a flavoring had been added] had been used by some people to flavor a manhattan cocktail while other people simply left it in the bottle after removing the cherries, and indicated that he would not use the syrup in that fashion. In any case, such purely subjective, personal, and occasional use of domestically bottled syrup by some consumers of maraschino cherries can hardly be considered to constitute a practicable, commercial usage of the syrup in question which ap-

parently never reaches the cherry consumer in the form imported, if at all.

On the record in this case the court finds that the case is brought within the principle of the *Hearty* case, as the evidence clearly establishes that the imported syrup lacks commercial value following its importation, and should not, therefore, be subjected to the specific duty applicable to the cherries. The allegations in the complaint are sustained. And judgment will be entered herein accordingly.

(C.D. 4647)

FINN BROS., INC.
BREHM IMPORTING CO.
C. ROSENBACH CO.
v. UNITED STATES

Carved ivory flowers

SEMIPRECIOUS STONES—COMMON MEANING—COMMERCIAL MEANING

Plaintiffs failed to prove that the tariff term "semiprecious stones" has a common or commercial meaning which would include carved ivory flowers used as parts of jewelry.

Court Nos. 70/64009, etc.
Court Nos. 70/9485, etc.
Court Nos. 70/24316, etc.

Ports of Boston and Providence

[Judgment for defendant.]

(Decided April 26, 1976)

Doherty and Melahn (*Walter E. Doherty, Jr.*, of counsel) for the plaintiffs.
Rex E. Lee, Assistant Attorney General (*Andrew P. Vance*, Chief, Customs Section, *Max Schutzman* and *Edmund F. Schmidt*, trial attorneys), for the defendant.

WATSON, Judge: In these jointly tried actions plaintiffs oppose the classification of their imported carved ivory flowers as jewelry or parts thereof [1] and seek classification of them as semiprecious stones.[2] Plaintiffs argue that these importations fall within the common meaning, or alternatively, the commercial meaning, of the term semiprecious stones. The record in *Finn Bros., Inc.* v. *United States*, 59 CCPA 72, C.A.D. 1042, 454 F. 2d 1404 (1972), *aff'g* 65 Cust. Ct. 252, C.D. 4085 (1970), was incorporated herein.

[1] Item 740.38 of the Tariff Schedules of the United States, as modified by T.D. 68-9, with duty at the rate of 49%, 44% or 38% ad valorem, depending on the date of entry.

[2] Item 520.39 of the Tariff Schedules of the United States, as modified by T.D. 68-9, with duty at the rate of 4% or 3% ad valorem, depending on the date of entry.

As a preliminary matter, I am of the opinion plaintiffs have successfully proved the importations are parts of jewelry rather than unfinished jewelry; the distinction being that as imported they are but one component of the contemplated article of jewelry and lack the essential metal findings such as rings, pins or pendants with which they must be combined in order to function as, or be considered and sold as, jewelry. See *Authentic Furniture Products, Inc.* v. *United States*, 61 CCPA 5, C.A.D. 1109 (1973), *aff'g* 68 Cust. Ct. 204, C.D. 4362, 343 F. Supp. 1372 (1972). See also, *Montgomery Ward & Co.* v. *United States*, 61 CCPA 101, C.A.D. 1131, 499 F. 2d 1283 (1974). I understand the term unfinished jewelry to mean jewelry articles possessing their essential parts but lacking some other measure of finality in their manufacture.

This finding has the effect of allowing plaintiffs to argue that the importations are parts of jewelry only in the sense that acknowledged semiprecious stones are parts of jewelry and therefore the tariff schedules headnote,[3] which excludes jewelry and other articles provided for in part 6 of schedule 7 from the subpart in which semiprecious stones are set out, has no exclusionary effect on these importations.

While I see no logical inconsistency or statutory obstacle to a claim that these importations are parts of jewelry in a certain sense but are more specifically provided for as semiprecious stones, I have not been persuaded that they are indeed semiprecious stones.

The proposition that the common meaning of semiprecious stones encompasses ivory articles, even those which are used in jewelry in a manner similar to acknowledged semiprecious stones, was not proved in this case nor did I see any indication that it could be proved. A common meaning which would exclude ivory is so much more plausible and verifiable that I see no merit in this aspect of plaintiffs' claim.

On the question of whether the tariff term "semiprecious stones" has a commercial meaning, that is to say, a well understood meaning of the trade which differs from its common meaning and which Congress can be assumed to have known, there was a divergence of opinion between the witnesses. I was not persuaded by plaintiffs' witnesses that a commercial meaning exists for the term in question.

The best proof of commercial meaning is not proof of the logic of the asserted trade usage but proof of the fact that it predominates.[4] In this case plaintiffs' proof was directed more to rationalizing the con-

[3] Headnote 1(vi) of schedule 5, part 1, subpart H.

[4] For example, there was no particular logical reason for the commercial designation of imitation oriental rugs being applied to rugs which imitated none of the characteristics of oriental rugs or for the limitation of the term "palm oil" to the oil of one variety of palm tree. *Stephen Rug Mills* v. *United States*, 32 CCPA 110, C.A.D. 293 (1944); *Nylos Trading Company* v. *United States*, 37 CCPA 71, C.A.D. 422 (1949).

sideration of these ivory articles as semiprecious stones than to supporting the essential proposition that they were in fact *known* as semiprecious stones in the trade.

The testimony does establish that ivory is an organic substance comprising the teeth or tusks of certain animals and contains a large percentage of a mineral known as apatite. It has a value which would permit it to be called semiprecious in the sense that it falls between the extremes of value by which substances are categorized. It is an article of commerce in the jewelry trade and may be used in jewelry in the same manner as precious or semiprecious stones. It is treated in texts which have as their primary subject precious and semiprecious stones. All this may be granted. But the ultimate proposition, that ivory in the imported form or otherwise, is known in the trade as semiprecious stones, does not flow from the preceding facts nor was it established to my satisfaction by the opinion testimony of plaintiffs' witnesses, particularly in the face of strong testimony to the contrary from defendant's witnesses. I found no reason to give greater weight or credence to the testimony of plaintiffs' witnesses. In fact, I was left with the impression that their view of ivory articles as semiprecious stones was strained and expressed in a more tentative, oblique and technical manner than would be the case if it were simply the prevailing usage in the trade.

It has often been said that commercial meaning is rarely established in customs litigation. This is probably true, not because it requires a more demanding degree of proof but because the situations are relatively rare in which a tariff term has such a widespread "uncommon" meaning in a trade that Congress can be presumed to have used it that way as well.

In sum, I have not been persuaded that these importations are known in the jewelry trade as semiprecious stones. Consequently the classification under the provision for jewelry must be sustained. Judgment will enter accordingly.

(C.D. 4648)

THE NEWMAN IMPORTING CO., INC. *v.* UNITED STATES

Backpacking tents

SPORT

Backpacking, an activity in which persons travel on foot in wild areas and maintain themselves with supplies and equipment carried on their backs, is a sport within the meaning of the tariff schedules.

SPORT EQUIPMENT

Tents specially designed to be carried and used as shelter in the sport of backpacking are sport equipment.

Court No. 73-6-01414

Port of Los Angeles

[Judgment for plaintiff.]

(Decided April 26, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Steven P. Florsheim*, trial attorney), for the defendant.

WATSON, Judge: Plaintiff seeks classification of its imported tents as sport equipment[1] instead of the classification assigned by the customs officials under a residual provision for articles of textile materials.[2] Plaintiff claims these tents are designed for use in the sport of backpacking. Defendant argues that backpacking is not a sport and, even assuming it is, these tents are not used in the sport in the sense in which sport equipment must be used. Defendant also argues that these tents are not of the quality used in "serious" backpacking and further that a legislative intent existed to exclude tents from classification as sport equipment.[3]

Based on the testimony, I am persuaded that backpacking is a sport and that these tents are designed for use in the sport of backpacking so as to come within the meaning of the tariff term "sport equipment."

I have concluded from the evidence that backpacking is the activity of traveling on foot in relatively wild areas and maintaining oneself with supplies and equipment carried on one's back. This activity falls within my understanding of the term "sport." It possesses to a meaningful degree the same attributes of healthy, challenging and skillful recreation which characterize such acknowledged sports as scuba diving, skiing, horseback riding and mountain climbing.

I reject the government's contention that a sport must involve competition either between individuals or against the natural elements;

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[1] Item 735.20 of the Tariff Schedules of the United States, as modified by T.D. 68-9, providing for duty at the rate of 12% ad valorem.

[2] Item 389.60 of the Tariff Schedules of the United States, as modified by T.D. 68-9, providing for duty in the amount of 25¢ per pound, plus 18% ad valorem.

[3] This final argument relies on material from the Explanatory Notes to the Brussels Nomenclature (1955) and the Standard Industrial Classification Manual (1957). Since I detect no ambiguity in the term "sport equipment" there is no need to look for clues to legislative intent. Furthermore, I have strong doubts as to whether the language of the Brussels Nomenclature (APPLIANCES, APPARATUS, ACCESSORIES AND REQUISITES FOR * * * SPORTS * * *) or the SICM (SPORTING * * * GOODS) is sufficiently similar to the term "sport equipment" to support any conclusions drawn from the former as to the scope of the latter.

although I would say that the activity of backpacking involves sufficient subjection to the forces of nature to qualify as a competitive sport in the second sense of the government's contention. In any event the element of enjoyment or recreation arising from the development or practice of individual skills, different from those involved in routine daily activities, is a better indication of a sport than competitiveness. See, *Sports Industries, Inc.* v. *United States*, 65 Cust. Ct. 470, 474, C.D. 4125 (1970). See also, *David E. Porter* v. *United States*, 76 Cust. Ct. 97, C.D. 4641 (1976). In short, the common meaning of the word "sport" is not limited to competitive activities, a fact which can be generally confirmed by reference to the dictionary definitions.

From the testimony it is clear that the use of a shelter is a necessary and regular part of the prudent practice of backpacking, and the normal method of obtaining shelter while backpacking is to carry and utilize a specially designed, lightweight portable tent.[4] At this point I note specifically that the use of a tent for shelter is part of the sport of backpacking, which encompasses not only the act of walking with a pack on the back but all the activities associated with the maintenance of the individual while away from "civilization." In this respect tents would be equipment even under the stringent view of equipment formerly prevailing and exemplified in *Cruger's (Inc.)* v. *United States*, 12 Ct. Cust. Appls. 516, T.D. 40730 (1925), which held equipment to be limited to objects ordinarily required for the proper and efficient playing of a sport or protection from its hazards. It would therefore seem certain that under the modern view that sport equipment includes not only that which is "necessary" but also that which is specially designed for use in the sport, these tents are indeed sport equipment. See generally, *American Astral Corporation* v. *United States*, 62 Cust. Ct. 563, C.D. 3827, 300 F. Supp. 658 (1969).

That these tents were specially designed for use in backpacking is not in doubt as is made plain by the testimony as to their design and the emphasis placed on their lightness, compactness and ease of assembly.[5] Consequently, since backpacking is a sport and these tents are equipment specially designed and even necessary for use in the sport, they should have been classified for tariff purposes as sport equipment under item 735.20 of the TSUS, as modified.

Judgment will enter accordingly.

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[4] On this essential point these tents are distinguished from the nets which were held not to be golf equipment in *Nichimen Co., Inc.* v. *United States*, 72 Cust. Ct. 130, C.D. 4514 (1974). The nets bordering the areas in which golfers practice their sport were not being used in the sport in anything approaching the sense in which these tents are used in backpacking.

[5] Defendant's argument that these tents lack the quality to be used in "serious" backpacking was not supported by the evidence and was not persuasive. I see no indication that sport equipment must be of a quality required by the most demanding practitioners of a sport or that these tents are not of a sufficient quality to be used in the sport. *Cf. New York Merchandise Co., Inc.* v. *United States*, 62 Cust. Ct. 38, C.D. 3671, 294 F. Supp. 971 (1969).

(C.D. 4649)

AMERICAN CUSTOMS BROKERAGE CO., INC., A/C ALBERS MILLING COMPANY *v.* UNITED STATES

Animal feeds

Grain screening pellets, produced in Canada and used as animal feed, were properly classified under item 184.75 of the tariff schedules as "[a]nimal feeds, and ingredients therefor, not specially provided for, other," and dutiable at the rate of 8 per centum ad valorem. Plaintiff's claim that the pellets were classifiable and duty free under item 184.70 of the schedules, as modified by T.D. 68–9, as "[b]yproducts obtained from the milling of grains, mixed feeds, and mixed-feed ingredients" was not proven, and was therefore overruled.

MIXED FEEDS—FEEDSTUFFS

Headnote 1(b) of schedule 1, part 15, subpart C requires that a mixed feed consist of an admixture of grains (or products, including byproducts, obtained in the milling of grains) with molasses, oil cake, oil-cake meal or other feedstuffs; also that the grain content weigh no less than 6% of the mixed feed. The pellets at bar, though made of byproducts from the cleaning of various types of grain, contained neither molasses, oil cake or oil-cake meal. Plaintiff contended that the one other component, "LLS," was "other feedstuffs" within the headnote. Testimony and exhibits, however, established that "LLS" was not a feedstuff but a binding agent used to bind the pellet and make it more firm. Evidence designed to show that "LLS" was also used as a source of metabolizable energy was wholly inadequate to support a finding that it was a feedstuff within the meaning of the pertinent headnote and decided cases. *United States* v. *F. W. Myers & Co., Inc.*, 29 CCPA 34, C.A.D. 168 (1941); *Walter Johnson* v. *United States*, 21 CCPA 129, T.D. 46464 (1933); *Cia. Mexicana de Malta, S.A.* v. *United States*, 69 Treas. Dec. 729, T.D. 48273 (1936); *Southwestern Sugar & Molasses Co.* v. *United States*, 18 Cust. Ct. 128, C.D. 1056 (1947); *Mary G. Ricks* v. *United States*, 7 Cust. Ct. 63, C.D. 535 (1941). All the record evidence, including exhibits, established that "LLS" (liquid calcium lignosulfonate) was a product used for binding purposes, i.e., to form or bind the pellet, and was not used as a feedstuff.

Court No. 73–3–00796

Port of Honolulu

[Judgment for defendant.]

(Decided April 30, 1976)

Glad, Tuttle & White (*Edward N. Glad* and *Steven W. Baker* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Robert Masters* and *Ira J. Grossman*, trial attorneys), for the defendant.

RE, Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of certain merchandise produced in Canada, and entered at the port of Honolulu, Hawaii.

The merchandise consists of grain screening pellets used as animal feed. It was classified as animal feeds, and ingredients therefor, not specially provided for, other, under item 184.75 of the Tariff Schedules of the United States, [TSUS], as modified by T.D. 68–9. Consequently, it was assessed with duty at the rate of 8 per centum ad valorem.

Plaintiff contests that classification, and claims that it should have been classified as animal feeds, and ingredients therefor, not specially provided for: byproducts obtained from the milling of grains, mixed feeds, and mixed-feed ingredients, under item 184.70, TSUS, as modified by T.D. 68–9. Hence, plaintiff maintains that the merchandise should have been admitted duty free.

The following are the pertinent provisions of the tariff schedules as modified by T.D. 68–9:

Classified under:

Schedule 1, Part 15, Subpart C:

"Animal feeds, and ingredients therefor, not specially provided for:

* * * * * * *

184.75	Other	8% ad val."

Claimed under:

Schedule 1, Part 15, Subpart C, Headnote 1:

"For the purposes of this subpart—

(a) the term 'animal feeds, and ingredients therefor' embraces products chiefly used as food for animals, or chiefly used as ingredients in such food, respectively, * * *

(b) the terms 'mixed feeds' and 'mixed-feed ingredients' in item 184.70 embrace products which are admixtures of grains (or products, including byproducts, obtained in milling grains) with molasses, oil cake, oil-cake meal, or other feedstuffs, and which consist of not less than 6 percent by weight of the said grains or grain products."

Schedule 1, Part 15, Subpart C:

"Animal feeds, and ingredients therefor, not specially provided for:

* * * * * * *

184.70	Byproducts obtained from the milling of grains, mixed feeds, and mixed feed ingredients	Free"

Also pertinent is General Interpretative Rule 10(e) which provides:

> "(e) in the absence of special language or context which otherwise requires—
>
> (i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;"

The record reveals that the grain screening pellets at bar are made from the byproducts of the cleaning of various types of grain. The byproducts are the screenings and dust taken from the pollution filters, and include small particles of grain, broken pieces of grain, and chaff. These grain screenings, as they are called, are pulverized, compressed, and mixed with steam and a binder or binding agent, to form the pellets. The mixing and binding process is accomplished in a pelletizing machine.

The binder or binding agent used in the making of the pellets is called "Lignosite," a trademark owned by the Georgia-Pacific Corporation. It is prepared in different forms for various commercial markets, and can be either liquid or a dry powder. The liquid form, liquid calcium lignosulfonate, is known commercially as "LLS."

A summary of the components and uses of the "LLS Pellet Binder" are found in a technical bulletin published by Georgia-Pacific. It is a liquid byproduct of the production of paper from wood cellulose, and is advertised as a feed pellet binder derived or extracted from "spent sulfite liquor." It comprises about one half of one percent of the weight of the pellets at bar which are produced by the firm, Pacific Elevators.

The claimed duty free category, within item 184.70, applies to "[b]yproducts obtained from the milling of grains, mixed feeds, and mixed-feed ingredients." By virtue of headnote 1(b), *mixed feeds* must consist of an admixture, not less than 6% by weight, of grains, or byproducts obtained from the milling of grains with "molasses, oil cake, oil-cake meal, or other feedstuffs."

Plaintiff summarizes its position by stating that the "product at bar includes grains and grain products in which the grain content is over 6% by weight, and the modified calcium lignosulfonate preparation known as 'LLS'." Asserting that "LLS" is "other feedstuffs" within the meaning of the headnote, it concludes that the imported

merchandise meets the prescribed requirements, and should therefore be classified under item 184.70, and admitted duty free.

The defendant agrees that a product to be classified as "mixed feed" under item 184.70 must consist of not less than 6% by weight of grains, but contends that there is "no evidence that the subject merchandise fulfills this requirement." The defendant also agrees that in addition to the grain ingredients, a "mixed feed" under item 184.70 must contain "molasses, oil cake, oil-cake meal, or other feedstuffs." It is its position, however, that the "LLS," admittedly the binder or pellet binding agent used in the subject merchandise, is not "other feedstuff." Consequently, the defendant maintains that the imported merchandise "cannot properly be classified under item 184.70 *supra*, and was correctly classified under item 184.75."

Several cases decided under the predecessor provision found in the Tariff Act of 1930 shed some light upon the legal issue presented. Paragraph 730 of the Tariff Act of 1930 provided for "by-product feeds obtained in milling wheat or other cereals," and for "mixed feeds, consisting of an admixture of grains or grain products with oil cake, oil-cake meal, molasses, or other feedstuffs."

In *Cia. Mexicana de Malta, S.A.* v. *United States*, 69 Treas. Dec. 729, T.D. 48273 (1936), this court, based upon the language of the 1930 tariff provision, held that a mixture of only one grain did not qualify for classification as "mixed feeds." Even though the merchandise consisted of ground small grains and cracked grains of barley, the court stated that "[i]t is clear that the only grain involved in the product before us is barley." 69 Treas. Dec. at 731. Additionally, the court indicated that the product could not have been classified as "mixed feeds" because: "There is not, however, any oil cake, oil-cake meal, molasses, or other feedstuffs in the mixture." *Ibid.*

In *United States* v. *F. W. Myers & Co., Inc.*, 29 CCPA 34, C.A.D. 168 (1941), also decided under paragraph 730, the appellate court held that a mixture of several products consisting of grain or grain products, but without any "oil cake, oil-cake meal, molasses or other feedstuffs," did not qualify as "mixed feeds." The court indicated clearly that:

> "the statute does not provide for 'mixed feeds' consisting of an *admixture of grains or grain products*, but, on the contrary, provides for 'mixed feeds, consisting of an admixture of grains or grain products *with* * * * *other feedstuffs*,' that is, feedstuffs other than grains or grain products, including 'oil cake, oil-cake meal' and 'molasses.'" (Emphasis in original.) 29 CCPA at 38.

The appellate court consequently reversed the determination of this court that had held the mixture of grain products, without "other feedstuffs," dutiable as "mixed feeds."

Other cases show that the imported "mixed feed," in its imported condition, must be fit for use as an animal feed, although it need not necessarily be a complete or balanced ration. *Walter Johnson* v. *United States*, 21 CCPA 129, T.D. 46464 (1933); *Southwestern Sugar & Molasses Co.* v. *United States*, 18 Cust. Ct. 128, C.D. 1056 (1947). As stated in the *Southwestern Sugar & Molasses* case, "Congress must have intended that the term 'mixed feed' include concentrated mixtures containing grain and other feedstuffs which form a necessary part of an animal's diet, and not only feeds which contain a complete ration for an animal." 18 Cust. Ct. at 134.

Paragraph 730 of the Tariff Act of 1930 did not contain a provision which required any particular percentage of grain or grain products. As a result of the case of *Corporacion Argentina de Productores de Carnes* v. *United States*, 32 CCPA 175, C.A.D. 304 (1945), which required merely that the percentage be "substantial," Congress added the "not less than 6 percent by weight" requirement in headnote 1(b).

In the case at bar the parties are in agreement that item 184.70 of the tariff schedules requires an admixture of both grains and other feedstuffs. See *Mary G. Ricks* v. *United States*, 11 Cust. Ct. 128, C.D. 809 (1943), *aff'd*, 33 CCPA 1, C.A.D. 308 (1945); *Mary G. Ricks* v. *United States*, 7 Cust. Ct. 63, C.D. 535 (1941).

Plaintiff asserts that the imported merchandise "meets all of the grain requirements" for classification as "mixed feeds." It urges that the "other aspect of the requirements for classification as a mixed feed is the inclusion of 'molasses, oil cake, oil-cake meal, or other feedstuffs'," and that "LLS" is an "other feedstuff."

Defendant denies that "LLS" is an "other feedstuff," and contends that plaintiff "has failed to carry its burden of proving chief use of LLS as a feedstuff." See General Interpretative Rule 10(e)(i); see also schedule 1, part 15, subpart C, headnote 1(b) (*supra*).

The plaintiff states the question presented as follows:

> "Is the binding agent liquid lignosulfonate, commercially known as 'LLS', used in the production of the imported pellets, included within the meaning of the term 'other feedstuffs' in Headnote 1(b) of Schedule 1, Part 15, Subpart C, TSUS?"

In its reply brief plaintiff states that "the merchandise has already been classified as animal feed and ingredients therefor under item 184.75 and thus is presumed to fall within the definition of these terms in headnote 1(a), Subpart C, Part 15, of Schedule 1, TSUS as being chiefly used as food for animals or chiefly used as ingredients in such foods." It is to be noted, however, that the product classified by the customs officials is the *grain screening pellet* which was found to be an animal feed. All that may be presumed from that classification is

that the entire pellet, made up of byproducts from the cleaning of various types of grain, is chiefly used as a "food for animals." Plaintiff cannot rely on the customs classification as a determination that each of the ingredients of the grain screening pellet, including the binding agent, "LLS," is in itself a product "chiefly used as food for animals."

For plaintiff to prevail under the claimed classification, it must prove that the pellet consists of an admixture of grains, or products, including byproducts, obtained in the milling of grains, "with molasses, oil cake, oil-cake meal, or other feedstuffs." Admittedly, molasses, oil cake and oil-cake meal are feedstuffs, but the pellet does not contain any of them. The question, therefore, is whether "LLS" is an "other feedstuff," and, if it is, whether the pellet consists of not less than 6% by weight of grains or grain products.

On this record the court finds that plaintiff has not succeeded in bearing its burden of proof that the pellet binder, or binding agent "LLS" is included in "other feedstuffs" for classification under item 184.70. A contrary finding would do violence to the presumption of correctness that attaches to official administrative action, which, in customs classification cases, has been codified by the Customs Courts Act of 1970. 28 U.S.C. § 2635(a). At this late date, no citation is required for the principle that the classification of the customs officials is presumed to be correct, and that, in order to prevail, plaintiff must bear a dual burden, viz., it must establish that the customs classification is incorrect, and that the claimed classification is correct. Plaintiff has failed to meet this burden.

To qualify as "mixed feeds" the admixture of grains or byproducts must be "with molasses, oil cake, oil-cake meal, or *other feedstuffs* * * *." (Emphasis added.) The doctrine of *ejusdem generis* is usually helpful to determine the meaning of general words which follow a specific enumeration. In this case the general words, "other feedstuffs," follow the specific enumeration of "molasses," "oil cake," and "oil-cake meal." The only case where reference was made to the application of this doctrine of statutory construction to the words "other feedstuffs" is *Corporacion Argentina de Productores de Carnes* v. *United States*, 32 CCPA 175, C.A.D. 304 (1945). The court, in that case, uttered the following dicta:

> "The rule which requires that, in determining the classification of an imported article under a general clause which follows specifically enumerated articles, they all should be regarded as of the same class, we think, cannot be urged as a controlling consideration here. The specific enumerations preceding the general clause 'or other feedstuffs' are oil cake, oil-cake meal, and molasses. It would seem there is about as much difference between molasses and oil cake or oil-cake meal as there is between a mixed meat, cereal, and vegetable product and molasses.

> In other words, the enumerated articles belong to no single general class, except insofar as they are feedstuffs." 32 CCPA at 184–85.

Even assuming the correctness of the statement that the "enumerated articles belong to no single general class," the determination must nevertheless be made whether "LLS" is included in "other feedstuffs."

Webster's Third New International Dictionary of the English Language defines "feedstuff" as "a feed for domestic animals; *usu:* any of the constituent nutrients of an animal ration."

In the *Corporacion Argentina* case, which was decided by the Court of Customs and Patent Appeals in 1945, the court concluded that the term "feedstuffs," under the Tariff Act of 1930, included feeds for dogs. The court stated:

> "The best definitions of the terms 'mixed feeds' and 'feedstuffs' with which we have been made acquainted, are in War Food Order 99, 9 Fed. Reg. 5016, where these terms are defined as follows:
>
> > 'Mixed feed' means any mixture or combination of two or more natural or artificial feedstuffs used or intended for use in feeding livestock, poultry, fur-bearing or other animals.
> >
> > 'Feedstuff' means any material or substance used or intended for use in the feeding of livestock, poultry, fur-bearing animals or other animals for any purpose whatever." 32 CCPA at 183.

What may be gathered from these sources is that a "feedstuff" may be any product used or intended to be used to feed animals. Clearly, the product must itself be an animal feed.

The court finds that the previous definitions do not include a product used to form or bind a feed for animals. "LLS" is not used to feed animals, but is used to bind byproducts from the cleaning of various types of grain, and make pellets better suitable for their use as feed for animals. Plaintiff has not established that "LLS" is itself a feedstuff. Despite plaintiff's claim that "LLS" has some food value, it did not prove that "LLS" is used as "animal feed," as are molasses, oil cake, oil-cake meal or other feedstuffs.

Although the words "other feedstuffs" were in the Tariff Act of 1922, only meager guidance is offered by cases decided under that act. Additionally, no case has been found which has dealt with lignosulfonate or any of the other similar products referred to in the present case.

Since "LLS" is not one of the products enumerated in the pertinent headnote, plaintiff asserts that it serves to replace one of those named, viz., molasses. The evidence, however, does not permit such a finding. The reliable testimony reveals that molasses is not used as a binder and that "LLS" is not used for its food value. On the record, therefore,

any claim that "LLS" is "other feedstuff" because of its alleged similarity to molasses, is untenable.

Plaintiff stresses that "LLS" has some food value, and that, however "small" or "low," it is "not of such negligible quantity that it can be ignored under the *de minimis* rule." It adds that "[l]ignin sulfonates are registered as food additives with the Food and Drug Administration * * *, and are provided for in 21 CFR 121, 234 (1971 edition) covering use as a pelleting aid, binding aid, surfactant, and as a *source of metabolizable energy*." (Emphasis in original.) Registry, or permission for their use as food additives, however, does not justify the conclusion that lignin sulfonates in general, or "LLS" in particular, are "other feedstuffs" within the meaning of the pertinent headnote. The evidence of record designed to show that "LLS" was also used as a "source of metabolizable energy" is wholly inadequate to support a finding that it is a "feedstuff" or "other feedstuff" under item 184.70 of the tariff schedules.

All of the witnesses indicated with crystal clarity that the purpose or reason for the use of the "LLS" was to form or bind the pellet. Indeed, both of plaintiff's witnesses dispelled all doubts on this crucial question. Their testimony, on the essential nature and purpose for the use of "LLS," is conclusive. "LLS" is "a feed binder" used to bind the pellet and make a "firmer" pellet. It is a product made "for binding purposes to make a better pellet." There is no evidence to permit a finding that it is "animal feed" or a "feedstuff."

In addition to the testimony of the witnesses, technical bulletins of Georgia-Pacific on "Lignosite" and lignin chemicals also describe the "LLS Pellet Binder," "Perma-Pel," and "Lignosite 50%, Neutralized." The bulletin on the "LLS Pellet Binder," in part, describes it as follows:

> "Georgia-Pacific LLS is a refined calcium lignosulfonate especially designed for use as an animal and poultry feed pellet binder. LLS is approved for use in feed preparations by the FDA up to 4% by weight on a solids basis. LLS has a metabolizable energy level comparable to many ingredients it would replace in the formula. Palatability and ingestion are not affected.
>
> Pellets containing LLS consistently achieve greater durability than untreated pellets or pellets using dry binders."

"Perma-Pel," a dry or solid form of lignosulfonate, is described as "a refined calcium lignosulfonate manufactured within close specification for use as an animal and poultry feed pellet binder. Use of Perma-Pel allows manufacture of more durable pellets * * *."

The record indicates that, notwithstanding the difference in names, and the addition of a "small amount of surface active [surfactant] agent," LLS is "identical" to "Lignosite 50%, Neutralized." Mr. Watson, a witness for the plaintiff and a manager of market develop-

ment for the Georgia-Pacific Corporation, testified that the two products are the same, and "would differ only in the addition of the surfactant."

Mr. Baum, a witness for the defendant, and an expert "in the field of lignosulfonate chemistry," agreed that LLS and Lignosite 50%, Neutralized were "basically * * * the same product with a different label." When asked if he knew of "any other uses aside from use as a pellet binder during 1971 to which liquid lignosulfonate was put," Mr. Baum replied: "Linoleum mastic adhesive and in the concrete industry."

The technical bulletin on "Lignosite 50%, Neutralized," under the heading "Uses," states:

> "Lignosite 50%, Neutralized is an anionic material which lends itself to a variety of applications. Major applications include the following industries:
>
> | | |
> |---|---|
> | Cement | Ceramics |
> | Gypsum Board | Structural Clay |
> | Adhesive | Refractories" |

Upon the record presented the court can only conclude that "LLS" is precisely what it is advertised to be in the Georgia-Pacific technical bulletin, viz., a "pellet binder." As stated in the technical bulletin it is "specially designed for use as an animal and poultry feed pellet binder." It is not "an animal and poultry feed." It is "an animal and poultry feed *pellet binder*." (Emphasis added.)

All of the evidence, exhibits and testimony show clearly that "LLS" is a pellet binder or binding agent. Apart from unsubstantiated factual assertions, there is nothing in this record that would justify a finding that "LLS" is "other feedstuffs," within the meaning of the pertinent headnote, as claimed by the plaintiff. Plaintiff has not succeeded in proving that "LLS" is "other feedstuffs," as required by the headnote, and its claim for classification of the imported merchandise under item 184.70 of the tariff schedules must fail.

In view of this court's finding that plaintiff has not proven that "LLS" is an "other feedstuff" within the pertinent headnote, it is not necessary to pass upon defendant's assertion that "plaintiff has not carried its burden of proof with respect to the 6% requirement of item 184.70, TSUS."

Since plaintiff has failed to meet its burden of proof in establishing that the imported merchandise satisfies a statutory requirement for classification under item 184.70 of the tariff schedules, the claim is overruled, and the customs classification under item 184.75 is sustained.

Judgment will issue accordingly.

(C.D. 4650)

A. JOHNSON & CO., INC. *v.* UNITED STATES

Iron fragments

PRIMARY METAL—CHEMICAL ELEMENT—EXCLUSION INAPPLICABLE

Iron fragments of more than 99.9% purity produced in Japan under a patented process for electrolyzing iron (Shizuo process) and remelted after importation into the United States and used primarily for alloying purposes and where very high purity is desired, *held*, not dutiable under TSUS item 657.20 as modified by T.D. 68–9 as classified inasmuch as the imported merchandise is not an "article" of iron but iron in a primary form although not provided for under Part 2B of TSUS Schedule 6, but dutiable under TSUS item 415.50 as modified by T.D. 68–9 as claimed by the importer inasmuch as the merchandise is a chemical element in any physical form which is not excluded from such classification by headnote 1(iii) of TSUS Schedule 4 because the exclusionary language is directed only to the metals actually provided for under Part 2 of TSUS Schedule 6.

Court Nos. 70/19276, etc.

Ports of New York, Baltimore,
San Francisco and Portland, Oreg.

[Judgment for plaintiff.]

(Decided May 6, 1976)

Busby Rivkin Sherman Levy and Rehm (*Joseph S. Kaplan* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Andrew P. Vance*, Chief, Customs Section, and *Joseph I. Liebman*, trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this case, described on commercial invoices as Mairon Electrolytic Iron Cathode Plate or Mairon Electrolytic Iron Flake, was exported from Japan in 1969 and 1970, and classified in liquidation under TSUS item 657.20 as modified by T.D. 68–9 as articles of iron at the duty rate of 13 or 15 *per centum ad valorem*, depending upon date of entry.* It is alleged that the merchandise should be classified under TSUS item 415.50 as modified by T.D. 68–9 as chemical elements in any physical form at the duty rate of 7 or 8 *per centum ad valorem*, depending upon date of entry, or alternatively, under TSUS item 799.00 as modified by T.D. 68–9 as any article not provided for elsewhere in the schedules at the duty rate of 7 or 8 *per centum ad valorem*, depending upon date of entry.

*The government excepted the entry covered by protest 70/21566, wherein it is conceded that the merchandise was erroneously classified under TSUS item 609.17.

The essential facts in the case are not in dispute. "Mairon", the proprietary name given by the exporter, Toho Zinc Co., Ltd., to the merchandise in this action, is produced from residues derived from the refining of zinc ore. Its production involves a number of steps, a principal one being the deposition of iron upon a stainless steel cathode which has been electrolyzed from a cast-iron anode.

The entire series of steps was described and diagramed at the trial by Dr. Shizuo Sato, chief engineer in charge of refining at Toho's head office, and the inventor of a patented process for electrolyzing iron (Shizuo process) which was used in the production of Mairon. In its imported form Mairon, as exemplified by exhibit 1, consists of flat fragments of iron of irregular shape generally less than 2 inches across at the widest point and about one-fifth of an inch thick. Mairon is iron of more than 99.9% purity; and its shape results from the manner in which the electrolyzed iron is removed from the stainless steel cathode.

Philip F. Sheridan, manager of plaintiff's industrial sales department, testified that Mairon is a raw material which is primarily used for alloying purposes, and in circumstances where very high purity is desirable, and that its form and size make it suitable for vacuum melting. Some is also used in air melting in induction furnaces. Although literature published by plaintiff indicates usage of Mairon as a catalyzer, among other things, the witness Sheridan stated that Mairon is not commercially suitable for such usage because it is too expensive.

Plaintiff argues that Mairon is a basic shape and form of iron which has not been provided for in Part 2B of TSUS Schedule 6, is not classifiable in Part 3G of TSUS Schedule 6 because it is iron and not a product of iron, but that it is provided for in TSUS item 415.50 because it is a chemical element not otherwise provided for if not excluded therefrom by headnote 1(iii) of TSUS Schedule 4, or is provided for under TSUS item 799.00 because it is not provided for elsewhere in the TSUS. Defendant argues that Mairon, whether or not a basic shape or form of iron, is definitely iron and is provided for in TSUS item 657.20 because the word "article" is broad enough to encompass *materials*.

In the court's opinion Mairon is undoubtedly iron in a primary form, whether considered as fragments or as flakes. However, Part 2B of TSUS Schedule 6 contains no provision for iron in the form of fragments or flakes, and unlike the other metals dealt with in Schedule 6, no provision for *unwrought* iron. Consequently, Mairon is clearly not provided for in Part 2B of TSUS Schedule 6.

Neither is Mairon provided for under TSUS item 657.20, a "basket" provision in Part 3G of TSUS Schedule 6. Mairon is not an article of iron, but iron itself. And the emphasis in item 657.20 is not on the

breadth of the word "article" as defendant's argument suggests, but rather on the scope of the term "articles of iron". A mere reading and comparison of Part 2 with Part 3 of TSUS Schedule 6 is sufficient, in the court's opinion, to reveal a Congressional intent to separate provisions relating to metal as material from provisions relating to products and advanced forms of such metal in achieving by deed, if not by word, a limitation on the application of the word "article" as used in this context. Thus, some advancement of the material iron is essential in order to properly designate the material iron as an "article" of iron. *Junge* v. *Hedden*, 146 U.S. 233 (1892). In the *Junge* case the Supreme Court, speaking with respect to an importation of dental rubber (composed of india rubber sheets subjected to chemical and other treatment) said (page 239):

> Nor are we impressed with the argument that, being rubber itself, it must be regarded as a material and not an article composed of rubber, *for its adaptation to dental purposes has differentiated it commercially*. Washing and scouring wool does not make the resulting wool a manufacture of wool; cleaning and ginning cotton does not make the resulting cotton a manufacture of cotton; *but sulphur and coloring matter*, when applied as here, *make the resulting rubber*, while still remaining rubber, *an article of rubber* as contradistinguished from rubber crude or rubber merely cleansed of impurities. [Emphasis added.]

The *Junge* case involved a duty assessment under and judicial construction of a "basket" provision in paragraph 454 of Schedule N of the 1883 Tariff Act reading "Articles composed of India rubber, not specially enumerated or provided for in this act." In more recent times this court has construed paragraph 397 of the 1930 Tariff Act, a "basket" provision of the metals schedule, and predecessor of TSUS item 657.20, so as to exclude metal as material from classification thereunder. See *Industrial Chemical & Dye Co.* v. *United States*, 54 Cust. Ct. 264, C.D. 2541 (1965). In C.D. 2541 the Customs Court held nickel powder not to be classifiable as contended for by the government under paragraph 397 as an *article* of nickel but as nickel *per se* in a form similar to those *eo nomine* provided for under paragraph 389 as claimed by the importer. Furthermore, that Part 3 of TSUS Schedule 6 was not intended by Congress to be a depository for primary forms of metal is indicated in the treatment given to zinc metal where a differentiation has been made between zinc anode, a primary form provided for in Part 2H of TSUS Schedule 6 under the heading of *unwrought* zinc (item 626.02), and zinc anode dedicated to specific uses by reason of the presence of special lugs, straps, etc. and provided for in Part 3F of TSUS Schedule 6 (item 653.25). *Tariff Classification Study*, Schedule 6, pages 33, 203.

Turning attention now to the chemicals schedule in the TSUS, it is to be noted that the superior heading under Part 2A of Schedule 4, reading "Chemical elements in any physical form" describes iron fragments such as those at bar, inasmuch as iron is a chemical element. *Encyclopaedia Britannica*, 1963 ed., Vol. 12, p. 645. Indeed, the *Tariff Classification Study* recognized that this description aptly applied to metals when it reported, "Some of the recognized metals are not named in the metals schedule and therefore are classified in the chemicals schedule. At least one metal, silicon, though specifically named in the metals schedule, is classified in the chemicals schedule if in a hyper-pure form." *Tariff Classification Study*, Schedule 6, page 86. But, as plaintiff views the situation, the problem here is whether iron fragments such as those at bar are excluded from classification under Part 2A of Schedule 4 by reason of language appearing in headnote 1(iii) to Schedule 4 which reads: "This schedule does not include—* * * metals provided for in part 2 of schedule 6." Defendant takes the position that this exclusionary language applies to iron *in toto*. Defendant argues, "Iron is specifically provided for in part 2 of schedule 6; therefore, defendant contends, iron is not included in schedule 4 and plaintiff's claim is without merit." (Defendant's brief, p. 18) However, since the exclusionary language in question is pegged to Part 2 of TSUS Schedule 6 defendant cannot be seriously contending that *all* iron, including the iron fragments at bar, is included in Part 2B of TSUS Schedule 6, and at the same time press for classification of the subject merchandise under the residual "basket" provision (item 657.20 of Part 3G of TSUS Schedule 6), inasmuch as residual classification can only be resorted to under Part 3G in the absence of a more specific classification under Part 2B.

In the court's opinion the exclusionary language in headnote 1(iii) to TSUS Schedule 4 goes no further than to provide a deterrent against dual classification of metal actually provided for and covered in Part 2 of TSUS Schedule 6. As previously indicated herein provision has not been made in Part 2B of TSUS Schedule 6 for iron flakes or fragments or for *unwrought* iron. Iron fragments are, however, described by the language "chemical elements" appearing in item 415.50 under Part 2A of TSUS Schedule 4. Thus, an exception which carves out of a statute something ordinarily included within its purview must be strictly construed. *Goat and Sheepskin Import Co.* v. *United States*, 5 Ct. Cust. Appls. 178, 180, T.D. 34254 (1914). As so construed, it follows that the iron at bar is not within the exception described in headnote 1(iii) to TSUS Schedule 4 inasmuch as it is not provided for in Part 2 of TSUS Schedule 6 to which headnote 1(iii) is directed.

The court concludes, therefore, that the imported iron fragments are properly classifiable as claimed under TSUS item 415.50. And in

view of this conclusion the court does not reach plaintiff's alternative claim for classification of the iron under the TSUS basket clause in item 799.00. Plaintiff's claim is sustained. And judgement will be entered herein accordingly.

(C.D. 4651)

HAROLD KOREN & CO., INC. *v.* UNITED STATES

Motion to sever and dismiss

Court No. 75-10-02526

Port of New York

[Defendant's motion granted.]

(Dated May 26, 1976)

Serko & Simon (*Joel K. Simon* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Andrew P. Vance*, Chief, Customs Section, and *Edmund F. Schmidt*, trial attorney), for the defendant.

MEMORANDUM OPINION AND ORDER

WATSON, Judge: Defendant's motion to sever and dismiss a portion of this action [1] places in issue the validity of rule 3.2(b)[2] of the rules of this court which provides in essence that a summons, the filing of which is a jurisdictional prerequisite to the commencement of an action in this court,[3] shall be deemed filed as of the date of postmark.

The summons in question was mailed on the last day allowed for commencement of an action [4] and was received by the court on the following day. The defendant challenges the validity of a rule which would consider the summons to have been filed on the day it was mailed, arguing that "filing" means receipt by the court and any rule which allows an action to be commenced by a summons actually

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[1] The motion is directed at the entries covered by protest Nos. 1001-4-020012 and 1001-4-020569.

[2] Rule 3.2(b) provides that:

For purposes of commencement of an action, a summons sent by registered or certified mail properly addressed to the clerk of the court at One Federal Plaza, New York, New York 10007, with the proper postage affixed and return receipt requested, shall be deemed filed as of the date of postmark.

[3] Section 113 of the Customs Courts Act of 1970, 28 U.S.C. § 2632(a), provides as follows:

Customs Court procedure and fees.

(a) A party may contest denial of a protest under section 515 of the Tariff Act of 1930, as amended, or the decision of the Secretary of the Treasury made under section 516 of the Tariff Act of 1930, as amended, by bringing a civil action in the Customs Court. A civil action shall be commenced by filing a summons in the form, manner, and style and with the content prescribed in rules adopted by the court.

[4] 28 U.S.C. § 2631(a) provides in essence for the barring of an action unless commenced within 180 days of the date of denial of the administrative protest.

received after the expiration of the allowable statutory period expands the jurisdiction of the court beyond that granted by statute.

I have concluded that as praiseworthy as were the motives for its promulgation this rule does indeed operate to expand the jurisdiction of the court to allow the commencement of actions at a time not permitted by the statute. Underlying this conclusion is my opinion that the word "filing" means receipt by the court; that the power given to the court to prescribe the "form, manner, and style" of filing is not so extensive as to allow mailing to be treated as filing, nor can the court create an evidentiary presumption of timely filing under these circumstances.[5]

I have not formed these opinions without a keen awareness of the misfortune that will befall some parties who relied on this rule in good faith. However, no degree of sympathy or sentiment of regret can withstand the absolute primacy of the principle of law which is at work here; that it is the Congress which determines the jurisdiction of this court. The power of the court, great as it is, must be exercised within the jurisdictional limits of the statute. Not even the most generous inclination to find an equitable solution can allow me to ignore or circumvent the basic jurisdictional requirement that an action must be commenced by the method of filing a summons at the proper time.

The rule here at issue must be immediately distinguished from rules which do not operate in relation to specific statutory jurisdictional limitations. Thus, rule 22 of the Supreme Court rules, which among other things fixes the time for filing a petition for writ of certiorari, provides for timely mailing to be deemed timely filing in the case of petitions from judgments entered in district courts outside the continental United States. In addition, the Supreme Court can relax the time requirements of the rule in the exercise of its discretion and in the interests of justice. See, *Schacht* v. *United States*, 398 U.S. 58 (1970). All this results from the fact that the statute under which rule 22 was promulgated contains no specific indication of the time limits to be allowed or the exact method by which petitions are to be "commenced". 18 U.S.C. § 3772 gives the Supreme Court the authority to " * * * prescribe the times for and manner of taking appeals and applying for writs of certiorari * * *." Thus, the Supreme Court is

[5] I express no opinion regarding what the court may do in the less extreme circumstance of a summons which was mailed sufficiently in advance of the last day to support an expectation that it would arrive on time in the ordinary course of the mail although I must admit to being uncertain whether the previous rule governing filing of a summons, rule 3.2(d)(3), could withstand the logical consequences of the analysis I make herein. Rule 3.2(d)(3) provided that when a summons arrived late, the court, on motion, could order it "to be deemed to have been filed" on the last allowable day upon proof of mailing by registered or certified mail sufficiently in advance of the last day to provide for receipt in the ordinary course of mail. That rule was upheld in *Texas Mex Brick & Import Co.* v. *United States*, 72 Cust. Ct. 291, C.R.D. 74-2 371 F. Supp. 579 (1974) and *Modern Clothing, Inc.* v. *United States*, 73 Cust. Ct. 233, C.R.D. 74-10 (1974).

free to prescribe rules regarding time and method and even relax those rules entirely without exceeding any statutory jurisdictional limitations.

The same cannot be said of the rules this court may prescribe regarding the commencement of an action. In our case the controlling statute sets out both the time limit within which actions must be commenced and the method by which they are to be commenced, which is "filing".

I have found no support for the proposition that "filing" can mean something other than the act of delivering the summons to the possession of the court. In the case of *United States* v. *Lombardo*, 241 U.S. 73 (1916), the government was in the position of arguing for a definition of filing as including deposit in a post office in order to support its claim that the venue of a criminal prosecution for failure to file a certain informational statement in Washington, District of Columbia, was properly laid in the district court of the state of Washington.[6] The government's theory was that the offense was begun in the state of Washington by the failure to post the required statement.

The Supreme Court rejected the government's theory, approved the district court judge's dismissal of the indictment and quoted, *inter alia*, his conclusion that "[a] paper is filed when it is delivered to the proper official and by him received and filed." There is no suggestion in the *Lombardo* case that the view of filing as receipt is a restrictive meaning developed for cases in which criminal consequences are involved and that a more flexible meaning ought to prevail in civil cases. In fact, the contrary was indicated when the Supreme Court went on to state as follows at page 78:

> * * * A court is constrained by the meaning of the words of a statute. They mark the extent of its power, and our attention has not been called to any case which decides that the requirement of a statute, *whether to secure or preserve a right* or to avoid the guilt of a crime, that a paper shall be filed with a particular officer, is satisfied by a deposit in the post office at some distant place. * * * [Emphasis supplied.]

In the sixty years since the *Lombardo* opinion, there does not appear to have been any change in the common understanding of what constitutes filing or any distinction developed between filings with criminal or civil consequences. *Travis* v. *United States*, 364 U.S. 631, 636 (1961); *Pratt* v. *First California Company, Inc.*, 517 F.2d 11 (10th Cir. 1975); *In re Imperial Sheet Metal, Inc.*, 352 F. Supp. 1149, 1151–1153 (M.D. La. 1973); *Blades* v. *United States*, 407 F. 2d 1397, 1399 (9th Cir.

[6] The offense in question was a failure to file with the Commissioner General of Immigration, located in Washington, D.C., an informational statement required of those who maintained alien women for the purpose of prostitution. Section 6 of the "White Slave Traffic Act" (36 Stat. 825, 826 (1910)).

1969). *Cf. Steele* v. *United States*, 390 F. Supp. 1109, 1112 (S.D. Cal. 1975).

In customs related decisions the view of filing as receipt has been generally maintained in such instances as of a statute requiring the filing of an application for review with the Court of Customs Appeals,[7] a statute governing the filing of a notice of appeal with the Court of Customs and Patent Appeals [8] and Customs Court rules requiring the filing of a motion for rehearing [9] and the filing of a complaint.[10]

In the face of the commonly accepted meaning of filing and the formidable body of case law previously discussed, I cannot believe that in providing for the court to prescribe the "form, manner, and style" of filing Congress meant anything more than the attributes of jurisdictional papers and their handling which it has customarily been the province of the courts to prescribe. The phrase "form, manner, and style" does not convey the power to consider as filing an act which has heretofore consistently and clearly been distinguished from filing. Mailing is not a form, manner or style of filing—it is a method of transmission which falls short of accomplishing the act of filing.

For the reasons expressed above, I find that rule 3.2(b) is invalid insofar as it permits the commencement of an action in this court by means of a summons which is not filed until after the expiration of the statutory period in which an action may be commenced. With respect to protest Nos. 1001–4–020012 and 1001–4–020569, the action relating thereto not having been commenced by the filing of a summons within the period provided by statute, the court is without jurisdiction in the case. It is therefore

ORDERED, that this action be and the same hereby is dismissed, insofar as it relates to the entries encompassed in protest Nos. 1001–4–020012 and 1001–4–020569, and that said entries be severed and returned to the regional commissioner at New York.

(C.D. 4652)

JOHN V. CARR & SON, INC.
PACCAR INC., d/b/a DYNACRAFT COMPANY
v. UNITED STATES

Automotive Products Trade Act of 1965—Fabricated components

Pursuant to the Automotive Products Trade Act of 1965, headnote 2(a), part 6B, schedule 6 of the Tariff Schedules of the United

[7] *United States* v. *Thompson-Starrett Co.*, 12 Ct. Cust. Appls. 28, T.D. 39696 (1923).
[8] *Seneca Grape Juice Corp.* v. *United States*, 61 CCPA 118 (1974).
[9] *Minkap of California, Inc.* v. *United States*, 55 CCPA 1, C.A.D. 926 (1967).
[10] *Andrew Dossett Imports, Inc.* v. *United States*, 69 Cust. Ct. 334, C.R.D. 72-26, 351 F. Supp. 1404 (1972).

States exempts from duty certain merchandise imported from Canada if (1) it is a Canadian article; (2) it has been obtained from a Canadian supplier pursuant to a written order from a bona fide motor vehicle manufacturer in the United States; (3) it is a fabricated component; and (4) it is intended for use as original equipment in the manufacture in the United States of a motor vehicle. In the present case, imported air-brake hose which concededly met all the requirements of the headnote save for the question as to whether the hose is a "fabricated component" was classified by the government under item 772.65 of the tariff schedules as hose and tubing of rubber or plastics and assessed duty at the rate of 5 percent ad valorem. Plaintiffs challenge this classification and contend that the imported hose is properly classifiable as a Canadian article and original motor vehicle equipment and thus free of duty. Against this background, the only issue in controversy is whether the imported hose is a "fabricated component" within the meaning of headnote 2(a), *supra*, and thus entitled to duty-free entry under item 772.66. *Held:* the imported hose is a "fabricated component" rather than a material and therefore plaintiffs' claim for duty-free entry is sustained.

FABRICATED COMPONENTS

The term "fabricated components" includes all elements that go into the final article which meet the conditions the statutory provision imposes. The imported hose meets all the conditions of headnote 2(a), *supra*, and is thus a "fabricated component."

FABRICATED COMPONENTS

The fact that the imported hose is imported in bulk on reels and then cut to length does not change the state of the fabrication of the hose. Indeed, the law is clear that in considering whether an article is a fabricated component, cutting to length does not constitute further fabrication.

FABRICATED COMPONENT—PART

In the Automotive Products Trade Act of 1965, Congress intended the term "fabricated component" to be an inclusive term of far wider application than an automotive "part."

Court No. 72-8-01766

Port of Port Huron (Detroit)

[Judgment for plaintiffs.]

(Decided May 28, 1976)

Helsell, Fetterman, Martin, Todd & Hokanson (*Benjamin G. Porter* of counsel) for the plaintiffs.

Rex E. Lee, Assistant Attorney General (*John A. Gussow* and *Mark K. Neville, Jr.*, trial attorneys), for the defendant.

MALETZ, Judge: This action involves the proper tariff classification of importations described on the special customs invoice as

"Dynacraft Hose SAE J1402 Type D." The hose was manufactured by the Goodyear Tire & Rubber Company of Canada, Limited, at Collingwood, Ontario, Canada, and imported in September 1971 by the Dynacraft Company, a division of Paccar Inc., Bellevue, Washington, one of the plaintiffs herein. Plaintiff John V. Carr & Son, Inc. is a customs broker, agent and attorney in fact for the importer.

The imported merchandise was classified by the government under item 772.65 of the Tariff Schedules of the United States as hose and tubing of rubber or plastics and assessed duty at the rate of 5 percent ad valorem. Plaintiffs challenge this classification and contend that the imported hose is properly classifiable under item 772.66 as a Canadian article and original motor vehicle equipment and thus free of duty.

Statutes Involved

772.65	Hose, pipe, and tubing, all the foregoing not specially provided for, of rubber or plastics, suitable for conducting gases or liquids, with or without attached fittings	5% ad val.
772.66	If Canadian article and original motor-vehicle equipment (see headnote 2, part 6B, schedule 6)	Free

Schedule 6, Part 6, Subpart B, headnotes:

* * * * * * *

2. Motor Vehicles and Original Equipment Therefor of Canadian Origin.

(a) The term "original motor-vehicle equipment", as used in the schedules with reference to a Canadian article (as defined by general headnote 3(d)), means such a Canadian article which has been obtained from a supplier in Canada under or pursuant to a written order, contract, or letter of intent of a bona fide motor-vehicle manufacturer in the United States, and which is *a fabricated component* intended for use as original equipment in the manufacture in the United States of a motor vehicle, but the term does not include trailers or articles to be used in their manufacture. [Emphasis added.]

* * * * * * *

(d) If any Canadian article accorded the status of original motor-vehicle equipment is not so used in the manufacture in the United States of motor vehicles, such Canadian article or its value (to be recovered from the importer or other person who diverted the article from its intended use as original motor-vehicle equipment) shall be subject to forfeiture, unless at the time of the diversion of the Canadian article the United States

Customs Service is notified in writing, and, pursuant to arrangements made with the Service—

(i) the Canadian article is, under customs supervision, destroyed or exported, or

(ii) duty is paid to the United States Government in an amount equal to the duty which would have been payable at the time of entry if the Canadian article had not been entered as original motor-vehicle equipment.

AGREEMENT CONCERNING AUTOMOTIVE PRODUCTS BETWEEN THE GOVERNMENT OF THE UNITED STATES OF AMERICA AND THE GOVERNMENT OF CANADA, 17 UST 1372 (1966)

The Government of the United States of America and the Government of Canada,

* * * * * * *

Agree as follows:

* * * * * * *

Article II

(a) The Government of Canada, not later than the entry into force of the legislation contemplated in paragraph (b) of this Article, shall accord duty-free treatment to imports of the products of the United States described in Annex A.

(b) The Government of the United States, during the session of the United States Congress commencing on January 4, 1965, shall seek enactment of legislation authorizing duty-free treatment of imports of the products of Canada described in Annex B. In seeking such legislation, the Government of the United States shall also seek authority permitting the implementation of such duty-free treatment retroactively to the earliest date administratively possible following the date upon which the Government of Canada has accorded duty-free treatment. Promptly after the entry into force of such legislation, the Government of the United States shall accord duty-free treatment to the products of Canada described in Annex B.

* * * * * * *

ANNEX A

1. * * * * * * *

(2) All parts, and accessories and parts thereof, except tires and tubes, when imported for use as original equipment in automobiles to be produced in Canada by a manufacturer of automobiles.

* * * * * * *

(4) All parts, and accessories and parts thereof, except tires and tubes, when imported for use as original equipment in buses to be produced in Canada by a manufacturer of buses.

* * * * * * *

(6) All parts, and accessories and parts thereof, except tires, tubes and any machines or other articles required under

Canadian tariff item 438a to be valued separately under the tariff items regularly applicable thereto, when imported for use as original equipment in specified commercial vehicles to be produced in Canada by a manufacturer of specified commercial vehicles.

* * * * * * *

ANNEX B

(1) Motor vehicles for the transport of persons or articles as provided for in items 692.05 and 692.10 of the Tariff Schedules of the United States and chassis therefor, but not including electric trolley buses, three-wheeled vehicles, or trailers accompanying truck tractors, or chassis therefor.[1]

(2) Fabricated components, not including trailers, tires, or tubes for tires, for use as original equipment in the manufacture of motor vehicles of the kinds described in paragraph (1) above.

(3) Articles of the kinds described in paragraphs (1) and (2) above include such articles whether finished or unfinished but do not include any article produced with the use of materials imported into Canada which are products of any foreign country (except materials produced within the customs territory of the United States) . . . .[2]

Against this statutory background, the only issue in controversy is whether the imported hose is a "fabricated component" within the meaning of headnote 2(a), part 6B, schedule 6 of the tariff schedules, and thus entitled to duty-free entry under item 772.66.

I

The facts are these: Plaintiff Paccar Inc. (formerly known as Pacific Car and Foundry Company) manufactures Peterbilt and Kenworth automotive truck tractors in plants located in the United States and Canada. Kenworth truck tractors are manufactured and sold under the trade name of Kenworth Motor Truck Company, an unincorporated division of Paccar. Peterbilt truck tractors are manufactured under the Peterbilt Motors Company trade name, another unincorporated division of Paccar. The parties agree that Paccar, Peterbilt, and Kenworth are all bona fide motor vehicle manufacturers within the meaning of headnote 2(a), part 6B. schedule 6 of the tariff schedule.

Kenworth and Peterbilt truck tractors are heavy-duty trucks. They are classified in the industry as "Class A trucks"—those with a gross vehicle weight of 33,000 pounds and above—and are used extensively in the logging, construction, and long-distance freight

[1] As of the time of the signing of this agreement in 1965, items 692.05 and 692.10 of the tariff schedules covered, among other things, automobile truck tractors and automobile trucks.

[2] The foregoing Agreement was implemented by the Automotive Products Trade Act of 1965, 19 U.S.C. § 2001 *et seq.*, P.L. 89-283, 79 Stat. 1016 (Oct. 21, 1965).

hauling industries. While the Peterbilt and Kenworth trucks are commonly used to pull truck trailers, neither Paccar nor its divisions manufacture trailers. The truck tractors typically travel 140,000 miles per year and are in operation up to 5,000 hours per year. They operate both on and off highways.

Components used in trucks must be designed to perform in a variety of weather conditions and temperature extremes, and to withstand vibrations and shocks far more severe than those experienced by components installed in a piece of machinery of similar size and magnitude in a plant. For example, a truck on a single run may travel from arctic cold in Alaska to desert heat in Texas. And at one particular time a piece of hose may be subject to a temperature range of 300 degrees—one end subject to the engine heat and the other to the cold of an Alaskan winter. As a rule of thumb, components used on an over-the-road application must be able to perform under conditions 10 to 20 times more rigorous than automobile applications.

The hose which is the subject of the present suit is purchased by Paccar under its trade name "Dynacraft Company." Dynacraft performs the function of purchasing, inventorying and warehousing various kinds of truck components which are intended for use by the Kenworth and Peterbilt truck manufacturing divisions. The hose is transferred from the Dynacraft division to the Kenworth and Peterbilt divisions by inventory transfers accomplished by appropriate bookkeeping entries.

The subject hose is made by the Goodyear Tire & Rubber Company of Canada, Limited, located at Collingwood, Ontario, Canada (sometimes referred to hereafter as "Goodyear of Canada"). The hose is manufactured in accordance with the Society of Automotive Engineers' ("SAE") specification J1402 Type D Class I. The Society of Automotive Engineers is an automotive industry association which prepares specifications for components used in the automotive field. The SAE J1402 Type D specification delineates performance and construction characteristics which are specifically tailored to the needs and performance characteristics required of an air-brake system during typical truck operations. In this connection, Paccar would be unable to sell vehicles if the hose in its truck air-brake lines did not meet the SAE J1402 Type D specification which is the standard for both the Canadian and United States automotive industries. Indeed, Paccar requires Goodyear of Canada to manufacture the subject hose so it will exceed certain of the minimum J1402 Type D specifications.

The hose is constructed around a rubber tube. The tube itself is made from a special type of synthetic rubber mixed together with other ingredients to form a rubber compound which is specifically manufactured for oil resistant uses and is designed to meet the SAE

J1402 Type D specification. The particular artificial rubber compound used to form the rubber tube used in the J1402 Type D hose is used in only three or four of the several hundred types of hose offered by Goodyear of Canada. The various ingredients are compounded by being mixed together in a large mixing machine to form a homogeneous mix. After compounding, the rubber is formed in slabs approximately 30 inches by 60 inches and stored for future use on wooden or metal skids.

When ready to be used, the rubber compound is shredded into strips and fed into an extruder. The extruder forms a rubber tube around a continuous nylon mandrel. The external dimension of the tube is determined by a die placed at the head of the extruder. The nylon mandrel around which the tube is extruded assures that the inside dimensions of the tube will remain constant and will meet the SAE specification which requires the hose to be mandrel built. The nylon mandrel, which remains inside the rubber tube during the hose construction process, supports the tube as it is fabricated into hose.[3]

After a 12-hour cooling period, the rubber tube with the nylon mandrel inside it is put through a braiding machine where three layers of braid are applied. As the tube passes through the braiding machine, a series of bobbins revolve around it forming a braid of fabric yarn. Next the tube covered with the first fabric braid passes through a box where it picks up a rubber based liquid cement. A second braid made of brass coated high carbon steel wire is applied on top of the rubber cement and the first layer of fabric braid. A strip of rubber which looks like a roll of friction tape is next laid on and surrounds the braid of wire. A third layer of braid, again consisting of a fabric yarn, is applied on top of the earlier braids and layers of rubber. After the hose passes through a latex dip, which impregnates the outer braid with a coating to protect against environmental conditions, the hose is rolled on to a large metal reel which can hold some 500 feet of hose.

After application of the two fabric and one steel braid and intervening layers of rubber cement, friction tape and latex dip, the hose is cured. First the uncured hose is unrolled and drawn through a lead press. The lead press extrudes billets of lead, under heat and hydraulic pressure, around the hose. The lead-sheathed hose is loaded onto a rather large reel which is put into a large autoclave or steam heater. The hose is then cured for approximately 30 minutes at 300 degrees Fahrenheit. As the hose is cured, the lead sheath forms a continuous external mold around the hose, and the nylon mandrel, which is still inside the middle rubber tube, expands. As a consequence, the hose is compressed between the nylon mandrel and external lead

[3] It is to be noted that a "tube" as it is known within the industry is made of a single extruded compound rather than many materials and is never made on a flexible nylon mandrel.

sheath giving it a solid construction with adhesion between component layers of the hose. The heat and pressure also cause the layer of rubber friction tape to flow into the layers of braid with the result that the curing process chemically cross-links the rubber into a state which will meet the SAE J1402 Type D specification requirements.

After curing, the exterior lead covering is peeled off the hose and the nylon mandrel is removed by blowing it out from the inside of the hose under water pressure. The hose is then proof pressure tested with water under specified pressure, and then passes through a printing machine.

The hose is next coiled on reels for shipment, and after passing various tests, including burst, adhesion, length change under pressure, periodic heat age, tolerance and general inspection tests required by the SAE J1402 Type D specification and by Goodyear of Canada and Paccar, the hose is released for shipment.[4]

The hose is marked by Goodyear in Canada with red lettering known as a "lay-line." Printed along one side of the hose is the "Dynacraft" name and a number identifying the date the hose was made. Also marked on the hose is the Dynacraft part number "1069" by which the hose is identified by the truck manufacturing plants, followed by a number which indicates the internal diameter of the hose. The Dynacraft catalogue describes this part number 1069 as "SAE 40R2 Type D [now J1402 Type D] Penn. State Approved for Air Brake Lines."

On the opposite side, and also in red lettering, appear: the letters "C.A." (which identify the hose as of Canadian origin); "Type D", the hose size expressed in a fraction; and the term "SAE J1402." These markings, repeated every 15 inches along the length of the hose, are required by both the SAE specification J1402 Type D and by Paccar.

In addition to meeting the performance requirements imposed by the SAE specification J1402 Type D and the additional performance requirements imposed by plaintiffs, Goodyear of Canada is also required to obtain Pennsylvania approval for use of the imported hose as automotive equipment within that state. The Commonwealth of Pennsylvania's approval of products for use as automotive equipment is a standard recognized by the industry, and a prerequisite for use of the hose in the other states in the United States and Canada. The Commonwealth of Pennsylvania certified the subject hose for use as automotive equipment.

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[4] As noted above, the hose in its condition as imported is coiled on reels. In this condition, the hose is considered by plaintiffs to be "bulk hose" as distinguished from a "hose assembly" which was defined by a witness for plaintiffs as a "hose complete with fittings attached." As will be discussed later in more detail, the hose in a hose assembly must be cut to length. Plaintiffs, it is to be added, have never imported hose assemblies since their own manufacturing plants make their own assemblies.

Paccar, d/b/a Dynacraft Company, purchased the merchandise in question pursuant to a blanket purchase order entered into with Goodyear of Canada. The purchase order refers to "40R2D" hose which is now known as J1402 Type D and contains the prices and terms and conditions under which the hose is acquired from Goodyear. Under the purchase order, Goodyear agreed to maintain on hand at all times an inventory equal to 25 percent of plaintiff's annual requirements. However, usage of the hose by plaintiff grew so fast that Goodyear was not able to maintain an inventory.

All of the hose imported under the entries in question was used as original equipment; in fact, all hose imported by plaintiff from Goodyear of Canada is intended for original equipment use.

Plaintiff purchases the entire J1402 Type D hose production of Goodyear of Canada. Due to defects in weaving and for other reasons, the length of each piece of hose—which is referred to by plaintiff as "bulk hose"—varies. The bulk hose is imported in various lengths tied end-to-end with twine and rolled onto reels. There is a prescribed mix of various lengths of hose on each reel. Plaintiff requires that each roll contain 10 percent of the hose in lengths of 3 to 25 feet; 25 percent in lengths of 25 to 40 feet; and 65 percent in lengths of over 40 feet. The shorter lengths of hose are at the top of the reel to facilitate use of the hose in the plant.

The bulk hose arrives at the truck manufacturing plant in exactly the same condition as imported, namely on palletized bulk reels of random lengths of hose which are tied together by twine and covered with a polyethylene covering. When ready to be used, a reel of hose is carried by a lift truck to a holding rack, which is located in an area designated as the "hose assembly area" that is adjacent to the truck assembly line. The reason for locating the hose assembly area adjacent to the truck assembly line is that the trucks are custom-built and hence the lengths of the hose frequently cannot be predetermined. Accordingly, for convenience and practicality, the hose assemblies are produced in an area close to the frame assembly. The foreman of the hose assembly area is given a "shopping list," i.e., a list of the lengths of hose and configurations of fittings needed by the lead man in the frame assembly area. If the length of hose needed is not to be found on the holding rack, and it usually is not, a workman pulls off a length of hose from the reel, measures it, and then cuts it to the desired length by use of a cut-off saw. Occasionally, a length of hose will correspond to a needed length as it is pulled off the reel, thus dispensing with the need for cutting to length.

Once cut to the necessary length, hose end fittings are attached to each end of the hose. Although most fittings are attached in the plant, about 15 percent of them are installed at the Lighthouse for the Blind in Seattle by legally blind and physically handicapped people. The

fittings consist of a collar and an insert and nut. The collar fitting, which has threads on the inside, is screwed on over the end of the hose, with the interior threads of the collar interfacing with the exterior cover of the hose. The insert and nut, or in the case of the field reusable model, the insert alone, is tapered and threaded on the exterior. It is inserted inside the hose through the collar. The threads of the insert match those on the inside of the open end of the collar fitting. The insert is screwed through the collar into the hose, compressing and holding the hose between the insert on the inside and the collar on the outside.

There are two kinds of inserts, one of which is a two-piece or field-reusable fitting and may be installed or removed with the use of hand tools—a wrench and a vise. The other type of insert, usually applied in the factory, is a three-piece or factory-reusable fitting which consists of a loose nut and insert and requires the use of a mandrel to install.

The fittings on the hose perform the function of attaching the hose to various truck components, in which connection it is to be noted that all components of a truck are attached to the finished vehicle by some means such as rivets, nuts, bolts, etc.

The imported hose is specifically designed for use in automotive air-brake lines for trucks, and more than 90 percent of the imported hose is actually used in air-brake systems. However, a small portion of the hose is used in the fuel lines and lubricating oil lines of Paccar trucks. The imported hose is used for these applications even though hose designed for fuel lines and lube lines costs half or less as much as the J1402 Type D hose. This is because the braking system of a highway truck is a critical safety system, and the air-brake hose is an integral part of that system. To avoid the possibility that a lower quality hose might be confused with an air-brake hose, Paccar, as a safety precaution, uses hose particularly designed for air-brake service for these other minor purposes in the trucks. The air-brake hose is more expensive than hose designed for lube oil and fuel oil lines because it is wire reinforced and has a higher resistance to heat. Hoses designed for lube oil and fuel oil lines would burst under pressures of between 300 and 800 pounds per square inch and could not be used as air-brake lines which withstand pressures of 7000 to 9000 pounds per square inch before bursting. The use of air-brake lines as lube and fuel lines is considered by plaintiff a misapplication of the hose and would not be used for those purposes if cost were the only consideration.

To the knowledge of the witnesses none of the J1402 Type D hose made for Paccar by Goodyear of Canada has ever been used in non-automotive uses.[5] Further, the hose is completely fabricated in

[5] While hose such as here involved is physically suitable for use in a variety of non-automotive systems in transmitting gasses or liquids, its cost is such as to make such use commercially impractical.

Canada in which connection the parties stipulated that "the merchandise which is the subject of the instant action is fabricated 'hose', not 'tubing' or 'pipe'." The only thing done to the hose itself at the plant after importation is the cutting of it to length or the trimming of it to size [6] and the attachment of end fittings. As the hose arrives at the plant in its imported condition, it is fully capable of meeting the performance requirements required of it. The hose is still recognizable as the same hose and no change is made in the properties of the hose after installation in a new motor vehicle. Finally, the parties stipulated that the imported merchandise is a Canadian article within the meaning of general headnote 3(d) of the tariff schedules, which in relevant part defines the term as an article that is the product of Canada.

II

The exemptions from duty provided by the Automotive Products Trade Act of 1965, 19 U.S.C. § 2001 *et seq.*, extend to merchandise meeting the following criteria set out in headnote 2(a), part 6B, schedule 6 of the tariff schedules:

1. It must be a Canadian article;
2. It must have been obtained from a supplier in Canada under or pursuant to a written order, contract, or letter of intent of a bona fide motor-vehicle manufacturer in the United States;
3. It must be a fabricated component; and
4. It must be intended for use as original equipment in the manufacture in the United States of a motor vehicle.

The parties stipulated that the hose is a Canadian article. The defendant's answer to plaintiffs' complaint admits that the hose is obtained from a supplier in Canada and that plaintiff Paccar is a bona fide motor vehicle manufacturer. Uncontradicted testimony establishes that the hose was obtained pursuant to a written order or contract, a blanket purchase order and shipping releases between Paccar, d/b/a Dynacraft, and Goodyear of Canada.

The witnesses testified that the intended use of the hose is original equipment in the manufacture of Peterbilt and Kenworth truck tractors by Paccar. In fact, all the hose imported under the entries in question was used as original equipment. The quantity of hose ordered from Goodyear of Canada and the dates of delivery are determined by the production of new Kenworth and Peterbilt tractors whose numbers have in the past and in particular in the year in question, 1971, exhausted Goodyear's supply of the subject hose.

Further, as noted previously, the parties have stipulated that the imported hose is "fabricated hose." In these circumstances, the only

[6] Occasionally, as previously noted, the hose does not have to be cut at the plant when the length required corresponds to the length of hose as it comes off the reel.

disputed issue (as indicated earlier) is whether the hose is a "fabricated component" as used in headnote 2(a), part 6B, schedule 6 of the tariff schedules and thus entitled to duty-free entry under item 772.66.

On this question, plaintiffs contend that the imported hose is a "fabricated component" as that term is used in the tariff schedules. Defendant argues, on the other hand, that the imported hose is a mere material.[7] For the reasons that follow, it is concluded that the imported hose is a "fabricated component" and that plaintiffs' claim must therefore be sustained.

At the outset, it is to be noted that the term "fabricated component" contained in the Automotive Products Trade Act (enacted on October 21, 1965) was incorporated by the Congress into the tariff schedules *for the first time* only *two weeks earlier* when the same Congress amended item 807.00 to add the virtually identical term "fabricated components" to describe a class of United States products, the cost of which is excluded in determining the value upon which duties are applied when the completed article is returned to this country. More particularly, section 85 of the Tariff Schedules Technical Amendments Act of 1965 (P.L. 89–241, 79 Stat. 933, Oct. 7, 1965), amended item 807.00 to provide this favorable treatment to—

> Articles assembled abroad in whole or in part *of fabricated components*, the product of the United States, which (a) were exported, in condition *ready for assembly without further fabrication*, for the purpose of such assembly and return to the United States, (b) have not lost their physical identity in such articles by change in form, shape, or otherwise, and (c) have not been advanced in value or improved in condition abroad except by being assembled and except by operations incidental to the assembly process such as cleaning, lubricating, and painting. [Emphasis added.]

The leading case interpreting the term "fabricated components" is *General Instrument Corporation* v. *United States*, 60 CCPA 178, 480 F. 2d 1402, C.A.D. 1106 (1973), reversing the decision of this court in 67 Cust. Ct. 127, C.D. 4263 (1971). In that case, anode foil, cathode foil, paper, metal tabs, plastic insulating film, and cellophane tape were exported in rolls from the United States to Taiwan, where they were then cut to length and assembled into capacitors.

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[7] Elaborating on its contention that the hose is a material rather than a fabricated component, defendant's brief states (Br. pp. 15–16):

> The bulk hose is a material, which must undergo a lengthy process of further fabrication before it may be referred to as a hose assembly. Only the hose assembly is usable as a part on a motor vehicle. The hose, itself, is imported in long bundles of hose, tied together, constituting a reel. Plaintiffs try to get the hose in as long lengths as possible. The hose is not marked—there being no indications where the hose should be cut. Cited case authority shows that this lack of pre-cutting, or even pre-marking, is an indicium of the hose's being material.

The anode foil not only had to be cut to length, but also had to be trimmed to bring it into proper width. The production of the capacitor, considering only those operations involving the United States merchandise, involved *twelve* different steps which were described by the appellate court as follows (60 CCPA at 180–181):

> (1) cutting the anode foil to a specified length from the roll as imported, (2) cutting an anode tab to length from a roll of material, (3) staking the anode tab to the cut anode foil at right angles thereto, (4) interleaving paper and cathode foil from rolls with the anode foil strip and winding them into a roll with the paper between the cathode and anode foils, (5) staking a previously cut cathode tab to the cathode foil at right angles thereto, (6) placing a length of plastic film under the anode tab, (7) adding two or three turns to the rolled-up assembly and then cutting the interleaved paper and cathode foil from the rolls, (8) securing the rolled-up paper and foil assembly against unwinding by applying cellophane tape from a dispenser, (9) immersing the rolled-up assembly in a liquid electrolyte solution, (10) removing the capacitor roll from the electrolyte and welding the cathode lead to the inside of the can, (11) attaching the anode tab to the inside of a previously made rivet and washer assembly and (12) inserting the rolled-up assembly in the can thus finishing the capacitor.

Against this background, the appellate court (as previously noted) reversed the decision of this court and held that the various products on rolls constituted "fabricated components." It is to be added that in *General Instrument* this court had relied upon its earlier decision in *Amplifone Corporation* v. *United States*, 65 Cust. Ct. 58, C.D. 4054 (1970), in which it held that a "fabricated component" had to be a complete unit itself and not subject to any assembly other than direct installation in the final product. The court in *Amplifone* ruled that various products were not "fabricated components" for the following reasons (*id.* at 63):

> . . . they are not in such a state of readiness at the time of exportation as to be capable of being incorporated into the coils, which, of course, is not the imported article. In such state, it may well be, for all the record shows, that each of the exported products in issue lends itself to usage for a hundred and one different purposes. In this state these products are at best described as fabricated products. It is only when they are subjected, while abroad in a foreign country, to measuring, cutting, winding, melting, etc., that these products can properly be described as component materials for transformer coils. And it is only after the resultant products are incorporated into the coils that the coils themselves become components in a state of readiness for incorporation into the transformers.

The court in *Amplifone* concluded (*id.* at 64):

> Under all the circumstances disclosed by this record we are of the opinion that the exported products do not come within the scope of the term "fabricated components, the product of the United States" as used in item 807.00 of the tariff schedules. As such, we are in accord with the argument advanced herein by defendant as hereinbefore noted and with the further argument recorded at page 12 *of* defendant's brief wherein it is stated ". . . the instant case involves the cutting and forming of *bulk materials* into *component parts, not* the mere *trimming* of *slight* amounts of excess material from an item already substantially completed." . . . [Emphasis in original.]

In the *General Instrument* case the Court of Customs and Patent Appeals rejected the rationale of the *Amplifone* case—the same argument advanced by the defendant in the case at bar—and, in reversing this court, held (as previously indicated) that the various products on rolls constituted fabricated components. The appellate court stated (60 CCPA at 182–183):

> The Government agrees with the reasoning of the Customs Court and argues that the disputed articles were not "fabricated components." In our view, item 807.00 generally defines *"fabricated components" as those components of the whole product* which (a) were not subject to "further fabrication," (b) did not lose their physical identity during assembly and (c) were not advanced in value. *We do not think that the language "fabricated components" has the separate import for which the Government contends. The only reasonable interpretation of item 807.00 is that all elements that go into the imported final article which meet the conditions the item imposes on the fabricated components are subject to the exclusion it provides.*
>
> We find that all the articles in issue here meet those requirements. Concededly all are products of the United States and all went into the imported electrolytic capacitors. *The meaning of "fabricated" is broad and without doubt applies to the rolls of foil, paper, cellophane tape and plastic insulating film which obviously were manufactured articles.* The articles did not lose their physical identity in the capacitor "by change in form, shape or otherwise." . . . [Emphasis added.]

In these circumstances, the subject hose is clearly a "component," i.e., an element which goes into the final article, as the *General Instrument* court defined the term. Even if both parties had not stipulated as a matter of fact that the hose is "fabricated," the numerous products and manufacturing operations which are required to produce the hose would lead inescapably to that conclusion. As such, the subject hose can only be described as a "fabricated component."

The clear import of the *General Instrument* decision is that fabricated components include *all elements* "that go into the . . . final article which meet the conditions the item imposes on the fabricated components . . . ." The only condition which headnote 2(a), part 6B, schedule 6 of the tariff schedules imposes on "fabricated components" is that they be intended for use as original equipment in the manufacture in the United States of a motor vehicle. Further, "fabricated components" in headnote 2(a), part 6B, schedule 6, unlike "fabricated components" under item 807.00, need not be "ready for assembly without further fabrication." This is emphasized by the report of the House Ways and Means Committee on the Automotive Products Trade Act of 1965 which report states in part (H. Rep. No. 537, 89th Cong., 1st Sess. (1965) p. 27):

> . . . although at the time of importation the component does not have to be in a condition completely ready for assembly without further fabrication, it must at a minimum be so far processed as to be physically recognizable as a component in an unfinished state.

The merchandise in issue far exceeds the Committee report's standard of required fabrication. The report states that "at the time of importation the component *does not* have to be in a condition completely ready for assembly without further fabrication . . . ." The hose at bar is merely despooled and cut to length and the mere act of cutting does not change the state of the fabrication of the hose. Indeed the law is clear that the cutting to length does not constitute "further fabrication." Thus in *General Instrument, supra*, our appellate court stated (60 CCPA at 183–184):

> There remains the matter of whether the items were exported "in condition ready for assembly without further fabrications." In *General Instrument Corporation* v. *United States*, 59 CCPA 171, 462 F. 2d 1156, C.A.D. 1062 (1972), the court regarded that provision met by fine gold wire which was exported on spools and in assembly was bonded at the end to an aluminum strip on a semiconductor chip and then severed. The paper in the present case, and the cathode foil in one form of capacitor, were cut to length after being at least partly assembled into the capacitor roll and thus met the provision in question in the same manner as the gold wire in the cited case. Although the anode foil, the cathode foil in some cases, the metal tabs and the Mylar film were cut to length before assembly with the other articles, we find no reason for considering them subject to any different treatment than the articles cut after assembly. Trimming of the edges of the anode foil amounts to an operation incidental to the assembly process and not to "further fabrication" under item 807.00. See *C. J. Tower & Sons of Buffalo* v. *United States*, 62 Cust. Ct. 643, 304 F. Supp. 1187, C.D. 3840 (1969), wherein trimming the edges of a composite sheet assembled abroad was not found to bar treatment under item 807.00.

This court in *The Olga Company* v. *United States*, 71 Cust. Ct. 42, C.D. 4468 (1973), reached the same conclusion, holding that rolls of thread, lace, tape, and elastic, in continuous lengths on large spools constituted fabricated components ready for assembly without further fabrication even though they had to be cut to length before use. See also *General Instrument Corporation* v. *United States*, 61 CCPA 86, 499 F. 2d 1318, C.A.D. 1128 (1974).

The short of the matter is that the hose in question is completely fabricated and ready for assembly without further fabrication. In this connection, not only did the parties stipulate that "the merchandise which is the subject of the instant action is fabricated 'hose' . . . ," the witnesses agreed that the hose, as it is imported, is completely fabricated and that no further fabrication of the hose itself is performed after it arrives in the United States. There is no change in the physical or chemical properties of the hose after importation. After installation on a new truck it is still completely identifiable.

The House Ways and Means Committee report previously referred to requires that at the time of importation the item "must at a minimum be so far processed as to be physically recognizable as a component in an unfinished state." H. Rep. No. 537, 89th Cong., 1st Sess. (1965) p. 27. In the case of the Paccar air-brake hose, the fact that it is a component is not only immediately apparent from the product's very nature, but is emblazoned in red legends running the length of the hose. On one side of the hose these announce to the world that it is "Type D, SAE J1402" hose; on the other, Paccar's trade name "Dynacraft" is alternated with the company's part number assigned to the product, "1069". The SAE nomenclature "Type D, SAE J1402" identifies the hose throughout the industry as a specific product—automotive air-brake hose—which has been made in conformance with and meets the performance requirements set forth in the specifications established by the Society of Automotive Engineers. The company's part number, "1069", identifies the item for the Kenworth and Peterbilt divisions of Paccar as one particular truck component.

In sum, at the time of its importation, the hose at bar is a completely finished component and is immediately recognizable as such. It more than meets the requirements of the Ways and Means Committee report to qualify as a "fabricated component." Defendant, however, points out that this Ways and Means Committee report also states (*id.* at 27):

> The term "fabricated component" is a term of limitation which embraces finished or unfinished components actually incorporated into a motor vehicle. The term does not, however, include materials, such as metal plate, sheet, strip, wire, *pipes and tubes*, and textile piece goods. In other words, although at

> the time of importation the component does not have to be in a condition completely ready for assembly without further fabrication, it must at a minimum be so far processed as to be physically recognizable as a component in an unfinished state. [Emphasis added.]

With respect to this report, defendant argues that "hose" is similar to "pipes and tubes." Therefore, according to defendant, the hose involved is covered by the words "pipes and tubes" which the report states are materials and thus are not included within the purview of "fabricated components." In point of fact, contrary to defendant's conclusion, the subject merchandise is not "tube" or "pipe." The stipulation of fact entered into between the parties to this litigation states in part: "The merchandise which is the subject of the instant action is fabricated 'hose,' not 'tubing' or 'pipe'."

In a related vein, defendant asserts that "[i]n the case of items 772.65 and 772.66, . . . it is clear that hose *with* its fittings was intended to be covered by item 772.66, while hose without its fittings (and similar pipe and tubing) was not intended to be encompassed in item 772.66 even though falling within the scope of item 772.65." (Br. p. 32, emphasis in original.) However, if Congress intended that hose without fittings not be classified as a fabricated component it would have so specified. For example, fabrications of wire are classifiable under the Automotive Products Trade Act free provision only if "fitted with fittings, or made up into articles," items 642.20 and 642.21. On the other hand, the specific language of items 772.65 and 772.66 provides a duty-free classification for "hose . . . *with or without attached fittings*." Further, the House Ways and Means Committee report previously referred to states, at page 27, in pertinent part, "the component does not have to be in a condition completely ready for assembly without further fabrication . . . ." At most, the attachment of fittings is an *assembly* process, rather than a fabrication of the hose, a fact impliedly recognized by the defendant's own characterization of the hose with fittings attached as a "hose assembly" and its description of the attachment of the fitting as an "assembly operation." (Br. p. 37)

It is to be added that the act of assembling a product does not constitute further fabrication. *General Instrument Corporation* v. *United States*, *supra*, 61 CCPA 86; *General Instrument Corporation* v. *United States*, *supra*, 60 CCPA 178. Moreover, the defendant's argument that only air-brake hose assemblies are "fabricated components" (Br. pp. 21–22, 32–33) is the same sub-assembly or dual-assembly argument the defendant advanced in *General Instrument Corporation*, *supra*, 60 CCPA 178, and which our appeals court rejected. *General Instrument Corporation*, *supra*, 60 CCPA at 182.

The *Harding* cases cited by defendant (*United States* v. *The Harding Co.*, 21 CCPA 307, T.D. 46830 (1933) and *The Harding Co.* v. *United States*, 23 CCPA 250, T.D. 48109 (1936)) have no relevance to the instant case. In the first *Harding* case, so-called brake linings made of asbestos, yarn and wire and imported in bales of running length were held to have been properly classified by the collector as a material, i.e., a manufacture of asbestos yarn rather than as parts of automobiles, finished or unfinished, as claimed by the importer. In the second *Harding* case, the record established that merchandise identical to that in the earlier case was used exclusively in the manufacture of brake linings for automobiles and was commercially unsuitable for other uses. Notwithstanding the exclusivity of use of the merchandise for automobile brake linings, the appellate court adhered to the conclusion that the merchandise was classifiable as a material, i.e., a manufacture of asbestos yarn and not a part of an automobile. In so finding, the court stated (23 CCPA at 253):

> Running through most of the decisions pertinent to the inquiry here, it is made clear that before imported merchandise shall be regarded as parts of an article *the identity of the individual article must be fixed with certainty.* This is not true in the case at bar, and we hold as we held in the former *Harding* case that the imported merchandise is material for making automobile brake linings and is not parts of automobiles. [Emphasis in original.]

Reliance upon the *Harding* cases is misplaced for several reasons. Unlike the present case, the *Harding* decisions involved the issue of what constituted an automobile "*part*." Nowhere do these decisions consider the term "fabricated component." If Congress had intended to limit duty-free status to only automotive parts it would have so provided, since it was certainly aware of the following meaning of the term "parts" contained in general headnote 10(ij) of the tariff schedules: "A provision for 'parts' of an article covers a product solely or chiefly used as a part of such article . . . ." On this aspect, a review of the tariff schedules shows that Congress intended a variety of Canadian articles to be eligible for duty-free treatment even though capable of many and diverse uses and thus not falling within the category of automotive "parts." For example, staples in strip form (item 646.20); rivets of base metal (items 646.40 and 646.41); cotters, cotter pins and fasteners or holders (except nuts) used with screws, bolts or studs, of base metal (item 646.42); wood screws of base metal (items 646.49, 646.51 and 646.53); bolts, nuts, studs, screws and washers, screw eyes, screw hooks, and screw rings and turnbuckles not otherwise described in part 3D, schedule 6 (items 646.54 through 646.78, inclusive) are all entitled to duty-free treatment under item 646.79 if Canadian articles and intended for use as original equipment

in a motor vehicle. From the foregoing, it is apparent that Congress meant the term "fabricated component" to be an inclusive term of far wider application than an automotive "part."[8]

Finally, defendant argues that because it is potentially possible to utilize the subject hose in non-automotive uses, this affects the product's classification as duty free. But this ignores the clear language of headnote 2(d), part 6B, schedule 6 of the tariff schedules, *supra*, which only requires that the fabricated component be *intended* for use as original equipment in the manufacture in the United States of a motor vehicle. It does not require that the sole, exclusive or even chief use of the article be in motor vehicles or that the fabricated component be an automobile "part." The same point is made in the previously referred to Ways and Means Committee report which states at p. 27 that "the term 'fabricated component' is a term of limitation which embraces finished or unfinished components *actually incorporated* into a motor vehicle." [Emphasis added.]

Beyond that, headnote 2(d), part 6B, schedule 6 allows duty-free entry conditional on the use of the item as original equipment in the manufacture of motor vehicles. If the imported item is diverted from its intended use, it, or its value, is subject to forfeiture unless, at the time of diversion, the Customs Service is notified in writing and arrangements are made either to destroy or export the article or to pay the appropriate duty which would have applied if the article had not been entered duty free under the Automotive Products Trade Act.

In summary, the only cases construing the meaning of the phrase "fabricated components" are the *General Instrument* cases, *supra*, which are not only relevant, but virtually dispositive of the case at bar. In fact (as mentioned previously) the standard required of a "fabricated component" before it is accorded favorable duty-free status as American goods returned under the *General Instrument* decisions is more rigorous than that required of goods qualifying under the Automotive Products Trade Act. For example, to be classified as duty free in the context of American goods returned, the fabricated component must be "ready for assembly without further fabrication" (item 807.00), while a fabricated component under the Automotive Products Trade Act qualifies for free treatment although not "completely ready for assembly without further fabrication." H. Rep. No. 537, p. 27. In addition, it must be concluded that the term "fabricated components" has the same meaning whether used in the context of American goods returned or the Automotive Products Trade Act.

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[8] It is not without significance that the Automotive Products Agreement itself, *supra*, distinguishes between "parts" and "fabricated components" with Annex A pars. 1 (2, 4 and 6) making reference to "parts" and Annex B (2) making reference to "fabricated components."

This is particularly true when it is considered that the phrase originated in both areas at about the same time, for the Automotive Products Trade Act of 1965 and the Tariff Schedules Technical Amendments Act of 1965 were both enacted by the *same* Congress within two weeks of each other.

For the reasons stated, it is held that the imported hose is a fabricated component and therefore entitled to duty-free entry under item 772.66. Plaintiffs' claim is therefore sustained and judgment will be entered accordingly.

(C.D. 4653)

STROMBECKER CORP. *v.* UNITED STATES

Constructed value—Separability

The parties join issue on the question of whether there was a separable appraisement (whereby plaintiff can rely on the presumption of correctness that attaches to all elements of the appraised values and selectively contest the position taken by the appraiser with respect to invoiced inland charges and buying commission), and on the question of whether the invoiced inland charges and buying commission added by the appraiser should be deducted from the appraised constructed value of the imported merchandise.

Certain appraisements are, *inter alia*, at invoice unit prices, net packed, plus officially noted inland charges and commission marked (X) on the invoices. Appraisements in that form have been consistently held separable as to the unit prices, net packed, and charges marked (X). *United States* v. *Vicki Enterprises, Inc.*, 68 Cust. Ct. 324, A.R.D. 302, 343 F. Supp. 1381 (1972), *aff'd*, 61 CCPA 75, C.A.D. 1125 (1974); *Cavalier Shipping Co., Inc., et al.* v. *United States*, 57 Cust. Ct. 652, R.D. 11231 (1966), *aff'd*, 59 Cust. Ct. 850, A.R.D. 229 (1967), *rev'd on other grounds*, 56 CCPA 217, C.A.D. 965, 412 F.2d 245 (1969); *Karl Schroff & Associates, Inc., Strombecker Corp.* v. *United States*, 66 Cust. Ct. 621, A.R.D. 286, 326 F. Supp. 967 (1971); *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, R.D. 11758, 337 F. Supp. 465 (1971); *Troy Textiles, Inc.* v. *United States*, 64 Cust. Ct. 654, R.D. 11697 (1970); *H. M. Young Associates, Inc.* v. *United States*, 64 Cust. Ct. 642, R.D. 11695 (1970).

Inland charges incurred after merchandise is in a condition packed ready for shipment to the United States incurred for the account of and paid for by the purchaser are not part of statutory constructed value. The value of merchandise does not include a *bona fide* buying commission paid by an importer. *Tapetes Luxor, S. A., et al.* v. *United States*, 56 Cust. Ct. 797, A.R.D. 206 (1966), *aff'd*, 54 CCPA 116, C.A.D. 921 (1967).

The proofs in this case are not substantially different from the proofs which these same parties made in *Karl Schroff & Associates, Inc., Strombecker Corp.* v. *United States, supra*, and merit the same result, namely, that the importer negotiated with a buying agent to take delivery of merchandise from various manufacturers at the buying agent's warehouse. The constructed values of the merchandise are the appraised values exclusive of the added inland charges and buying commission officially marked (X) on the invoices.

Court Nos. R69/13398, etc.

Port of Chicago

[Judgment in part for plaintiff.]

(Decided June 3, 1976)

Schwartz & Lidstrom (*Robert E. Burke* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John A. Gussow*, trial attorney), for the defendant.

LANDIS, Judge: This case involves customs appraisement, on constructed value basis,[1] of merchandise exported from Japan by Bee West Co. Plaintiff, Strombecker Corp., entered the merchandise at Chicago. For customs entry purposes plaintiff filed invoices prepared by Bee West covering consolidated shipments, that is, merchandise of several manufacturers consolidated into one shipment.

As officially noted on twenty of the twenty-four appraised entry invoices, the merchandise was appraised at invoice unit prices, net packed, plus separately stated invoice charges marked (X),[2] plus, where applicable, an amount for tooling costs.[3] The charges marked (X) are identified on the twenty invoices as inland freight to shipping port, insurance premiums, storage, hauling and lighterage, petties, and buying commission 5 percent.

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[1] In 19 U.S.C.A. § 1401a(d), constructed value is defined as follows:

(d) For the purposes of this section, the constructed value of imported merchandise shall be the sum of—

(1) the cost of materials (exclusive of any internal tax applicable in the country of exportation directly to such materials or their disposition, but remitted or refunded upon the exportation of the article in the production of which such materials are used) and of fabrication or other processing of any kind employed in producing such or similar merchandise, at a time preceding the date of exportation of the merchandise undergoing appraisement which would ordinarily permit the production of that particular merchandise in the ordinary course of business;

(2) an amount for general expenses and profit equal to that usually reflected in sales of merchandise of the same general class or kind as the merchandise undergoing appraisement which are made by producers in the country of exportation, in the usual wholesale quantities and in the ordinary course of trade, for shipment to the United States; and

(3) the cost of all containers and coverings of whatever nature, and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

[2] The appraised entry invoices in R70/8926, R70/9645, R70/3411 and R70/4091 do not show this notation.

[3] The addition of tooling costs is not in dispute.

Plaintiff, in its amended complaint, does not contest the appraiser's constructed value basis of appraisement.[4] What the case boils down to is plaintiff's claim that the appraiser should not have included the inland charges and buying commission in his valuation because the inland charges and buying commission were not expenses incurred by the manufacturer in producing the imported merchandise but expenses incurred by plaintiff for its own account.

The parties have briefed two basic issues. The first issue goes to the question of whether there was a separable appraisement whereby plaintiff can rely on the presumption of correctness that attaches to all elements of the appraised values and selectively contest the position taken by the appraiser with respect to the invoiced inland charges and buying commission. The second issue poses the question of whether or not the invoiced inland charges and buying commission added by the appraiser should be deducted from the appraised constructed value of the imported merchandise. Legal determination of those issues generally depends on the facts in each case. Elements of a separable appraisement not disputed are presumed correct. *United States* v. *Bud Berman Sportswear, Inc.*, 55 CCPA 28, C.A.D. 929 (1967). Inland charges incurred after merchandise is in a condition packed ready for shipment to the United States incurred for the account of and paid for by the purchaser are not part of a statutory constructed value. It is also judicially established that the value of merchandise does not include a *bona fide* buying commission paid by an importer. *Tapetes Luxor, S.A., et al.* v. *United States*, 56 Cust. Ct. 797, A.R.D. 206 (1966), *aff'd*, 54 CCPA 116, C.A.D. 921 (1967). On this record, excepting the four appraisement entries mentioned earlier,[5] I find for plaintiff on both issues.

Four of the appraisement entries in this case (R70/8926, R70/9645, R70/3411 and R70/4091) contain no relevant official notation, and there is no other evidence that indicates that inland charges and buying commission were included in the appraised constructed values. Absent official notation, or some other evidence of what the appraiser did in computing the constructed values, I am unable to find or determine that any of the four appraisement entries above referred to included inland charges and buying commission on con-

[4] Plaintiff, in its original complaint, claimed that export value (19 U.S.C.A. § 1401a(b)) was the proper basis for appraisement. Without objection, plaintiff amended its complaint to claim constructed value and export value only as an alternative basis. The question of whether the proof probatively establishes that the imported merchandise was freely offered to all purchasers or whether there was a climate indicating the same is not argued by the parties and is not deemed pertinent to a consideration of a constructed value appraisement.

See, *Karl Schroff & Associates, Inc., Strombecker Corp.* v. *United States*, 66 Cust. Ct. 621, A.R.D. 286 (1971), and compare, *Tapetes Luxor, S.A., et al.* v. *United States*, 56 Cust. Ct. 797, A.R.D. 206 (1966), *aff'd* 54 CCPA 116, C.A.D. 921 (1967).

[5] N. 2. *supra*.

structed value basis. *Cf. Bowl-O-Beauty Co.* v. *United States*, 75 Cust. Ct. 119, C.D. 4615 (1975). Accordingly, I find that the appraised constructed values in R70/8926, R70/9645, R70/3411 and R70/4091 are not separable. In those four reappraisements, therefore, plaintiff is put to prove all the statutory elements of constructed value. *Concord Electronics Corp.* v. *United States*, 66 Cust. Ct. 581, R.D. 11744 (1971), *aff'd*, 69 Cust. Ct. 241, A.R.D. 304, 345 F. Supp. 1000 (1972). Plaintiff does not presume to argue that it has proved all the statutory elements of constructed value. Since plaintiff has failed to overcome the presumption of correctness attaching to the appraised constructed values of the imported merchandise covered by the four reappraisement entries, the four will be severed and the case as to them dismissed.

The merchandise covered by the remaining twenty reappraisement entries, as I stated earlier, was appraised on constructed value basis at invoice unit prices, net packed, plus, *inter alia*, the officially noted disputed inland charges and buying commission.

Appraisements in that form have been consistently held separable.[6] *United States* v. *Vicki Enterprises, Inc.*, 68 Cust. Ct. 324, A.R.D. 302, 343 F. Supp. 1381 (1972), *aff'd*, 61 CCPA 75, C.A.D. 1125 (1974); *Karl Schroff & Associates, Inc., Strombecker Corp.* v. *United States*, 66 Cust. Ct. 621, A.R.D. 286, 326 F. Supp. 967 (1971); *Globemaster Midwest, Inc.* v. *United States*, 67 Cust. Ct. 539, R.D. 11758, 337 F. Supp. 465 (1971). And while the separability doctrine of appraisement developed in the context of appraisements on export value basis, the doctrine has been extended to appraisements on constructed value basis without serious challenge or objection from defendant. *Cavalier Shipping Co., Inc., et al.* v. *United States*, 57 Cust. Ct. 652, R.D. 11231 (1966), *aff'd*, 59 Cust. Ct. 850, A.R.D. 229 (1967), *rev'd on other grounds*, 56 CCPA 217, C.A.D. 965, 412 F. 2d 245 (1969); *Troy Textiles, Inc.* v. *United States*, 64 Cust. Ct. 654, R.D. 11697 (1970), *H. M. Young Associates, Inc.* v. *United States*, 64 Cust. Ct. 642, R.D. 11695 (1970); *see also Tapetes Luxor, S.A., et al.* v. *United States*, *supra*. Guided by the cited precedents, I find that the inland charges and buying commission included in the appraised constructed values are separable from the unit prices, net packed, and proceed to weigh the proofs that the expense of those items was for the account of and paid for by the importer and not the manufacturer.

The proofs in this case are not substantially different from the proofs which these same parties adduced in *Karl Schroff & Associates, Inc., Strombecker Corp.* v. *United States*, *supra*. In the cited *Strombecker* case the appraiser valued the merchandise on export value basis.

[6] Defendant's argument that the appraisements are not separable materially avoids discussing the appraiser's invoice notations.

On that basis the appraiser found that the export value of the merchandise included the amounts indicated on the invoices as inland freight to shipping port, insurance premiums, storage, hauling and lighterage, and petties.[7] Reviewing the record made in the cited *Strombecker* case, the appellate term of this court in an opinion by Associate Justice Clark [8] found (finding 11) that Strombecker "* * * negotiated for the purchase of the merchandise involved at prices which included delivery to his buying agent's warehouse and was able to take delivery from the various manufacturers at such warehouse, and that other purchasers represented by the purchaser's buying agent were able to do likewise." As a matter of law, the court concluded that the export value of the invoiced merchandise should not include the inland charges. The fact that this case involves valuation on constructed value basis is a distinction without legal difference so far as it concerns the invoiced inland charges. Inland charges incurred by a purchaser at no expense to the manufacturer are not part of statutory constructed value. *Tapetes Luxor, S.A., et al.* v. *United States, supra.*

The testimony of Mr. Alan Shure [9] in this case is of the same quality and weight as his testimony in *Strombecker, supra.* In my opinion this case merits the same result as in *Strombecker, supra,* for the following reasons: Mr. Shure stated that in connection with the purchase of the imported merchandise he traveled to Japan. In substance, he testified that in Japan he solicited and contracted with Bee West Co. to assist him in the purchase of the imported merchandise; to take delivery of the merchandise from the manufacturers for Strombecker and to service the shipment of the merchandise in return for which plaintiff agreed to pay Bee West Co. a commission.

The affidavit of Mr. Genichiro Onishi (exhibit 1), managing director of Bee West Co., is of the same quality and weight as the affidavit of his father, Akio Onishi, chairman of the board of Onishi Company, the stipulated buying agent in *Strombecker, supra.*[10] Genichiro Onishi's affidavit states that Bee West Co. is a wholly owned subsidiary of

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[7] The invoiced buying commission was not involved because defendant conceded that it represented an amount paid to Strombecker's *bona fide* buying agent.

[8] The Honorable Tom C. Clark, Associate Justice of the Supreme Court of the United States, retired, sitting by special designation.

[9] Mr. Shure was vice president of Strombecker at the relevant times the imported merchandise was imported.

[10] Defendant's objection to the affidavit in evidence is overruled. Plaintiff received the affidavit after it served the notice of trial and obviously could not furnish a copy to defendant with the notice of trial as provided in rule 9.6(b). I am not impressed that defendant says that because of plaintiff's failure to comply with the rule defendant has been "unable to prepare its own case in response to the specific contents of [the affidavit] * * *" simply because defendant reserved that contingency on the record. In any event no harm has been shown by defendant, particularly in view of my statement as trial judge: "Well, you gentlemen are familiar with the latter portion of rule 9.6(b), I assume, with reference to it 'may be waived or the time extended upon consent or by order of the court for good cause shown.' Now, if you want to continue this matter, you can go through the affidavit, the court would be amenable to that."

Onishi Company created to serve as an agent for foreign importers who buy merchandise in Japan. The affidavit further states that Onishi Company began acting as buying agent for Strombecker Corp. in 1960 and that in 1965, through the period April 1969 (the times here in issue), the function of buying agent was transferred to Bee West Co. The affidavit delineates the services Bee West Co. performed as buying agent and recites that the Bee West Co. commission and expenses incurred incident to delivering the merchandise from the Bee West Co. warehouse aboard the vessel were for the account of Strombecker and paid by Strombecker at no cost to the manufacturers of the merchandise covered by the shipments. Attached to the affidavit are copies of the agency agreements between Strombecker Corp. and Bee West Co.

Defendant argues that the Treasury report (exhibit A), which defendant introduced in evidence, "is persuasive of Bee West's role *qua* seller." (Defendant's brief, page 15.) I have read the report and find nothing in it that even suggests that in this case Bee West Co. acted as seller in its transactions with Strombecker. Aside from the mere saying, defendant refers to nothing specific in the report that would tend to support the fact that Bee West Co.'s relationship to Strombecker was that of a seller. To the contrary, the report appears to indirectly corroborate Bee West Co.'s role as buying agent in referring to the buying commission and the fact that Bee West buys merchandise from various manufacturers on behalf of Strombecker. The report does question certain aspects of the buying commission relevant to the amount Strombecker agreed to pay and the amount recited in purchase orders. The amount of the buying commission is not, however, an issue in this case. *Ross Products, Inc.* v. *United States*, 41 Cust. Ct. 550, R.D. 9225 (1958). The report also refers to "hidden profit" realized by Bee West Co. from the difference between the invoiced "ex-factory" price and the price Bee West Co. paid to each manufacturer. The alleged "hidden profit" is not factually developed and certain supportive exhibits referred to and said to be attached to the report are not part of the Treasury report in evidence. To repeat, nothing said in the report tends to rebut the Bee West Co. role as Strombecker's buying agent. Since there is no specific reference in the report concerning invoiced inland charges and buying commission, I am inclined to give the report little weight on those specific issues. *United States* v. *William Shalland*, 30 Cust. Ct. 575, A.R.D. 12 (1953); *A. Goldmark & Sons Corp.* v. *United States*, 15 Cust. Ct. 431, Reap. Dec. 6225 (1945); *G. R. Kirk Co. et al.* v. *United States*, 7 Cust. Ct. 424, Reap. Dec. 5387 (1941).

I find as facts:

1. That except for the appraisements in R70/8926, R70/9645, R70/3411 and R70/4091, the merchandise covered by the appraise-

ments in this case, on constructed value basis, was *inter alia* valued at the invoice unit prices, net packed, plus separately stated invoice inland charges and buying commission marked (X) on the invoices.

2. That Strombecker Corp. purchased the merchandise covered by these reappraisements from various manufacturers in Japan and in that connection employed the services of Bee West Co. as buying agent.

3. That the disputed charges marked (X) on the invoices represent charges incurred after the various manufacturers delivered the merchandise to the buyer's agent Bee West Co.

4. That none of the disputed charges marked (X) on the invoices was an expense to any of the manufacturers incident to the production of the merchandise or packing the merchandise ready for shipment to the United States.

I conclude as follows

1. That in this case constructed value, as defined in section 402(d) of the Tariff Act of 1930, as amended, is the proper basis of appraisement.

2. That except for R70/8926, R70/9645, R70/3411 and R70/4091 the appraised values are separable as to the invoice unit prices, net packed, and the stated invoice inland charges and buying commission marked (X) on the invoices.

3. That except for R70/8926, R70/9645, R70/3411 and R70/4091 the constructed values of the merchandise in this case are the appraised values exclusive of the invoiced amounts for those items marked (X) on the invoices.

Reappraisements R70/8926, R70/9645, R70/3411 and R70/4091 are severed from this case and as to those four this case is dismissed.

Judgment will be entered accordingly.

(C.D. 4654)

ARTMARK CHICAGO, LTD. *v.* UNITED STATES

Plastic horse figures

Plastic horse figures claimed to be figurines of plastics under the provision of item 773.10, Tariff Schedules of the United States, *held* properly classified as toy figures of animate objects as provided for in item 737.40, Tariff Schedules of the United States.

Classification by customs carries with it the presumption of correctness, 28 U.S.C. 2635 (1970), imposing a dual burden upon plaintiff.

The manner of sale is not necessarily determinative of classification. *S. Y. Rhee Importers* v. *United States*, 61 CCPA 2, C.A.D. 1108, 486 F. 2d 1385 (1973).

Chief use is a question of fact which must be established on the basis of positive testimony representing such use throughout the United States. *L. Tobert Co., Inc., American Shipping Co.* v. *United States*, 41 CCPA 161, C.A.D. 544 (1953). Such use must relate to the particular class or kind of article involved at or immediately prior to the time of importation.

Court No. 73-3-00816

Port of Chicago

[Judgment for defendant.]

(Decided June 7, 1976)

Schwartz & Lidstrom (*Thomas J. O'Donnell* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Saul Davis* and *Glenn E. Harris*, trial attorneys), for the defendant.

FORD, Judge: The question presented in this case pertains to the proper classification, for customs duty purposes, of plastic horse figures approximately 10 inches high, composed in chief value of plastic, having removable plastic saddles and metal reins. The merchandise was classified as toy figures of animate objects under provision of item 737.40, Tariff Schedules of the United States, as modified by T.D. 68-9, and assessed with duty at the rate of 21 or 17.5 per centum ad valorem depending upon the date of entry.

Plaintiff contends the horses are not toy figures but are in fact used for ornamental decoration and display. Accordingly, it is contended they are properly subject to duty at the rate of 10 or 8.5 per centum ad valorem as figurines of plastics as provided for in item 773.10, Tariff Schedules of the United States, as modified by T.D. 68-9.

The pertinent statutory provisions are:

Item 737.40

Toy figures of animate objects (except dolls):	
Not having a spring mechanism:	
* * * * * * *	
Not stuffed:	
* * * * * * *	
Other	17.5% or 21% ad val.
Item 773.10	
Plaques and figurines, of rubber or plastics	8.5% or 10% ad val.

Headnote 2, Subpart E, Part 5, Schedule 7, Tariff Schedules of the United States

2. For the purposes of the tariff schedules, a "toy" is any article chiefly used for the amusement of children or adults.

General Interpretative Rule 10(e)(i)

(e) in the absence of special language or context which otherwise requires—

(i) a tariff classification controlled by use (other than actual use) is to be determined in accordance with the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined;

The record consists of the testimony of four witnesses called on behalf of plaintiff and the receipt in evidence of twelve exhibits. Defendant introduced the testimony of nine witnesses and offered five exhibits in evidence.

Mr. Joseph Yashon, vice president and controller of Artmark Chicago, Ltd., testified he is familiar with all matters dealing with customs and identified the horse involved which was received in evidence as plaintiff's exhibit 1.

Plaintiff next called Mr. Alfred Ellis, vice president in charge of sales of Thunderbird Products Co. of Chicago. His duties include promotional work and attending shows as well as covering five states doing promotional sales work. Mr. Ellis was familiar with exhibit 1 as his firm purchases said item from Artmark. He has sold exhibit 1 in resort areas and western shops for 6 to 8 years. Based upon his experience in sales, exhibit 1 is sold in the giftware sections of souvenir shops, along with statues and ornamented items, or as collectors' items in western shops.

The witness identified a catalog of his company for 1974–1975 which was received in evidence as plaintiff's exhibit 2. On *voir dire*, Mr. Ellis stated that in the 1971–1972 catalog exhibit 1 was depicted in the giftware section. The catalog was divided in the same sections as in exhibit 2. He further indicated that approximately 4,500 catalogs are distributed throughout the United States each year. Mr. Ellis identified exhibits 3, 4, and 5 which he purchases from plaintiff and sells to the same buyers, i.e., giftware sections of stores. In his opinion they are used for collecting or ornamental purposes. The opinion of the witness on use is based upon the purchasers to whom he sells the item.

Mr. Ellis identified exhibits 6 and 7 having purchased them from Breyer Molding Co. He sells them to the same buyers as exhibits 1, 3, 4, and 5. They are sold by him to gift shops, the souvenir trade and western stores. The witness has seen such articles in windows, on televisions, on mantels, as well as an ornament on the back window or hood of a car. In his opinion the horses are collectible items used for display or ornamentation. The witness identified a brochure entitled

"Breyer's Animal Creations" which was received in evidence as plaintiff's exhibit 8. Mr. Ellis identified on pages 2 and 3, items 57 and 112 which he testified represented exhibits 6 and 7. Exhibit 1, being an import, is less expensive and would retail for approximately $5 while exhibit 6 would retail between $7 and $8 while exhibit 7 would retail between $6 and $7. The saddle on exhibit 1 is a western style saddle which makes it more pleasing to those who want a western horse as part of their collection.

Mr. Ellis identified exhibit 9, a plastic donkey which he has sold for approximately 10 years. This item was sold by him to the same type of stores, i.e., gift shops and western stores. The same evidence was adduced as to plaintiff's exhibit 10, a cow, and plaintiff's exhibit 11, a dog. The witness sold the reindeer, plaintiff's exhibit 12, for approximately 15 years and was of the opinion it is used for decorative, ornamental or collectible purposes.

On cross-examination, Mr. Ellis testified he sold exhibit 1 to gift shops in resort areas and that these shops also sell toys. Mr. Ellis' only information as to use is based upon information received from his customers. The witness did not know of his own personal knowledge the particular individuals who purchased the horse from the gift shop, nor did he know how these purchasers used the horse. Mr. Ellis did however see articles such as involved used to make lamps, and on the back window of automobiles.

Mr. Arthur Lozins, a salesman for plaintiff corporation since 1955, was then called on behalf of plaintiff. Mr. Lozins testified that he sells to two classes of customers, wholesalers (jobbers) and retailers. The wholesalers include florist jobbers, souvenir jobbers and carnival jobbers. The retailers include mail-order houses, large retail florists, discount stores and chain stores which are for the most part in the eastern two-thirds of the United States which area he personally covers.

In the opinion of witness Lozins, plaintiff's exhibit 1 is primarily used as a decorative item by horse collectors and fanciers. He is a horse owner and observed plaintiff's exhibit 1 for sale at a retail stand at a horse show for sale to horse fanciers.

On cross-examination, Mr. Lozins stated that retail stores which sell plaintiff's exhibit 1 also sell toys but that in his opinion less than 5 percent of the horses are displayed or sold with toys. He personally did not call on toy jobbers because in his experience he found they did not buy articles such as plaintiff's exhibit 1 in sufficient quantities to justify the time spent in selling such purchasers. Mr. Lozins testified that he does not of his own personal knowledge know how the ultimate purchaser uses articles such as plaintiff's exhibit 1.

Mr. Henry Berg was then called to testify on behalf of plaintiff. Mr. Berg is the owner of Berg Sales Co. which is a general wholesale merchandiser. He is also president of, and virtual owner of, Federal Supply Corp. which is a retail discount store. Both are located in downtown Chicago and he has been with them since 1937. Mr. Berg carries and sells plaintiff's exhibit 1 and for 20 years has sold horses of this type. Based upon his experience, Mr. Berg is of the opinion that such horses are used only for decorative purposes. The largest users, according to Mr. Berg, are teenage girls who use them to decorate their bedrooms. Plaintiff's exhibit 1 is offered for sale by him in his store along with other decorative items.

On cross-examination, Mr. Berg stated he sells toys in his wholesale company, but the store is divided into sections and plaintiff's exhibit 1 is displayed in a totally different section than the toys. While he has not personally observed the use of plaintiff's exhibit 1, the customers often volunteer their reasons for purchasing such merchandise.

The defendant called as its first witness Mr. Richard Mazursky, an employee of Montgomery Ward & Co. for 8 years. During the time period in question the witness was a toy buyer for his company. Mr. Mazursky is familiar with the manner in which Montgomery Ward advertises and sells its merchandise throughout the United States, except Hawaii. Toys are usually displayed in the toy section of the catalog and in the toy department of its retail outlets. The witness was familiar with defendant's exhibit A (Johnny West "Satan" Horse and Saddle) and exhibit B (Johnny West Rider "Captain Maddox" Doll) having purchased them for Montgomery Ward. Defendant's exhibit A was sold through catalog and was advertised in the toy section. Defendant's exhibit B was sold in the retail stores and sold in the toy section. Both articles in his opinion are toys.

The witness was also familiar with the Breyer horses, plaintiff's exhibits 6 and 7, having purchased similar horses for Montgomery Ward. Exhibits 6 and 7 were sold in the toy section of Montgomery Ward stores. In his opinion exhibits 6 and 7 are toys.

On cross-examination, Mr. Mazursky testified that all items sold in the toy section are not necessarily toys. Exhibits A and B were sold as sets and not separately. The sets included a horse, saddle and rider. Plaintiff's exhibit 1, according to the witness, had much better detail and had a more aesthetic quality than defendant's exhibits A and B. He also was of the opinion that exhibits A and B had a greater degree of play value than exhibit 1. Mr. Mazursky then stated he had seen horses such as exhibit 1 in his company's offices, in the retail stores and in a home. The horse he observed in the home was displayed as a collector's item on a bookshelf. Items such as exhibit 1 were exhibited for sale by Montgomery Ward as collectors' items, and when

sold in the toy department, they are enclosed in a glass case. The witness had never seen an article such as exhibit 1 used as a toy.

On redirect examination, Mr. Mazursky stated he had seen stuffed animals and dolls on a shelf and he considered them toys. When read the definition of toy contained in the Tariff Schedules of the United States, he stated plaintiff's exhibit 1 was a toy.

On recross examination, the witness stated the predominant or chief market for articles such as exhibit 1 is for girls in the 9- to 14-year-old age group as display items. A market for adults also exists.

Defendant next called Mr. John Striet, a toy buyer for Sears Roebuck & Co. Mr. Striet testified that Sears Roebuck & Co. sold defendant's exhibits A and B and in his opinion they are toys. They are advertised in the toy section of his company's catalog and sold in the toy department of its retail stores. Sears Roebuck catalog sales and stores are located in all 50 states.

On cross-examination, Mr. Striet stated that not everything sold in the toy department are toys. He was of the opinion that plaintiff's exhibit 1 is different than exhibit A in size, accessories, play value and fragility. He has never seen exhibit 1 in use, but it was his opinion that it is chiefly used for display and ornamentation. Exhibit 1 has greater aesthetic appeal. Exhibit A in the opinion of Mr. Striet is used by boys in the 4- to 12-year-old age group.

Dr. Rolf Peterson was called on behalf of defendant. Dr. Peterson holds a doctorate in psychology and specializes in clinical psychology and developmental psychology. He is an associate professor at the University of Illinois. Dr. Peterson has authored a number of articles relating to children and has coauthored a book utilized at the University of Illinois. He has observed children at play in school settings, in preschool and day care centers as well as in his home and the homes of neighbors.

Dr. Peterson had observed children playing with horses such as plaintiff's exhibit 1 and defendant's exhibit A. The child would pretend to feed it and pull the horse around the room, sometimes placing it under the bed to fantasize a barn setting. The child would play with the horse with or without a doll. The child would remove the saddle and manipulate the reins. The only aesthetic value a child finds in a replica of a horse is that it looks like a horse. The fact that exhibit 1 has less paraphernalia than defendant's exhibit A enhances the play value of exhibit 1 for children in the 3- to 5-year-old age group. While the witness has seen horses on a shelf in a child's room, they were in his opinion in a state of nonuse but are primarily a play object. According to Dr. Peterson, collecting is a form of play activity for a child. Collecting articles as a hobby by adults is in his opinion considered to be a form of amusement.

Dr. Peterson defined a hobby as collecting objects plus having knowledge about the objects the person collects such as the breed of the horse, etc. If an adult collected one or more plastic horses, this use in his opinion would be as a decorative item or figurine. Such a collection as a hobby would be for amusement plus learning.

Mr. Peter Stone, vice president and marketing director of Breyer Molding Co. was then called on behalf of defendant. Mr. Stone's responsibility is for the sales and development of the product line of Breyer Molding Co. He attends two trade shows every year, the Hobby Industry Association Show and the American Toy Fair. Toy and hobby items are displayed at both shows. Mr. Stone is familiar with plaintiff's exhibits 6 and 7 as both are manufactured by his company. These two items, according to Mr. Stone, are shown at both the hobby show and the toy fair. Sales of the Breyer horses are directed toward the young-girl age group. Mr. Stone was of the opinion that the Breyer horses such as exhibits 6 and 7 were sold in the manner depicted by defendant's exhibit E as collectors' items and used for play.

Mr. Stone believed a hobby item is an item which involves a youngster being creative and occupying his time with an article for his amusement, pleasure or fun. The witness has observed exhibits 6 and 7 used by children in setting up dioramas, farm scenes or racetrack scenes. This use could be analogized to the use of Barbi Dolls with their various accessories. The majority of such articles are used for play or amusement.

On cross-examination, Mr. Stone was of the opinion that collecting of horses does not militate against the article being primarily used by children for amusement purposes. The witness has seen horses on a shelf but he considered them in nonuse and the primary purpose was as a toy.

Defendant additionally produced the testimony of five children ranging from 8 years of age to 12 years of age. Their testimony related to the use of exhibit 1 or similar items by them for amusement and play.

Based upon the record as made, plaintiff contends it has established the involved merchandise to be properly subject to classification under item 773.10, Tariff Schedules of the United States, as figurines of plastics. In order to establish this claim, plaintiff must overcome the presumption of correctness attaching to the classification by the district director of customs. This presumption which is now statutory, 28 U.S.C. 2635 (1970), imposes upon plaintiff a dual burden which in this instance requires proof establishing that the involved horses are not chiefly used for the amusement of children or adults,* and further establishing the involved horses to be figurines.

*Headnote 2, Subpart E, Part 5, Schedule 7, TSUS.

Plaintiff's task in overcoming the first burden imposed upon it is to establish the involved horses are not chiefly used for the amusement of children or adults. General Interpretative Rule 10(e)(i) defines chief use as being the use which exceeds all other uses. Chief use is a question of fact which must be established on the basis of positive testimony representing such use throughout the United States. *L. Tobert Co., Inc., American Shipping Co.* v. *United States*, 41 CCPA 161, C.A.D. 544 (1953). Such evidence must relate to use of the particular class or kind of article involved at or immediately prior to the time of importation.

The evidence adduced by plaintiff falls short of negating the chief use attaching by virtue of the presumption of correctness. The witnesses called for the most part had not observed use and testified generally as to the type of store or department to which they sold the horse in question.

The court is of course aware of the general principle that an importer who testifies as to the purpose of manufacture and the market in which it is sold may establish a *prima facie* case. *The A. W. Fenton Co., Inc.* v. *United States*, 67 Cust. Ct. 519, R.D. 11755 (1971), *aff'd*, 70 Cust. Ct. 286, A.R.D. 313 (1973); *Davis Products, Inc., Frank M. Chichester* v. *United States*, 59 Cust. Ct. 226, C.D. 3127 (1967). In these cases defendant offered evidence of actual use which refuted the evidence presented by plaintiff's witnesses who were sellers.

In the case of *S. Y. Rhee Importers* v. *United States*, 61 CCPA 2 C.A.D. 1108, 486 F. 2d 1385 (1973), the appellate court in reviewing the manner of sale as it relates to chief use made the following observation:

> This leads to appellant's primary argument that the lower court found chief use as a greeting card. Great emphasis is placed on a statement by the Customs Court that "[t]he evidence preponderantly establishes that the imported inflatable articles are sold and purchased *in the same manner* that ordinary greeting cards are sold and purchased." [Emphasis quoted.] Appellant then argues that the Customs Court was, therefore, inconsistent in finding chief use as a greeting card and then classifying the imported items as toys. Such an inconsistency would, of course, be erroneous. However, as quoted above, the Customs Court clearly stated that the chief purpose of amusement "is not refuted by the evidence adduced at trial." Moreover, it said:
>
> > It is relatively of little probative value that the articles are sold at counters that feature "greeting cards" consisting essentially of printed matter, and not by retail stores that sell toys exclusively. There are few stores that any longer have a corner on the toy market.
>
> This court has had occasion to point out that the manner in which an article is bought and sold is not necessarily determina-

tive of its classification. *United States* v. *Ignaz Strauss and Company, Inc.*, 37 CCPA 32, C.A.D. 415 (1949); *United States* v. *Ignaz Strauss and Company, Inc.*, 37 CCPA 48, C.A.D. 418 (1949). *Novelty Import Company, Inc.* v. *United States*, 53 Cust. Ct. 274, Abstract No. 68780 (1964) is also in point. There certain imitation poodle dogs were classified as manufactures of rayon and other synthetic textiles. The importer protested that they were properly classifiable as toys not specially provided for and presented testimony concerning their display in toy sections of stores and their sale to toy jobbers. In overruling the protest, the Customs Court declared:

> The mere fact that three of the witnesses sold the imported items to toy jobbers and the other witnesses observed them displayed in the toy section of large stores, does not *ipso facto* make the involved merchandise toys since the merchandising medium through which articles may be sold is not always a proper criterion through which to judge the classification of an article. *United States* v. *Ignaz Strauss and Company, Inc.*, 37 CCPA 32, C.A.D. 415.

By the same token, testimony relating to the sale to giftware departments and western stores does not refute the presumption that the imported horse is chiefly used for the purpose of amusement of children or adults nor does it *ipso facto* establish the involved horse to be a figurine.

The record having failed to overcome the presumption of correctness attaching to the classification, the court must overrule the claim and sustain the classification.

Judgment will be entered accordingly.

(C.D. 4655)

BRENTWOOD ORIGINALS *v.* UNITED STATES

Cross-motions for summary judgment

Court No. 72-2-00359

Port of Los Angeles

[Plaintiff's motion granted.]

(Decided June 7, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

MEMORANDUM OPINION AND ORDER

WATSON, Judge: The merchandise at issue here is the same as was the subject of *Brentwood Originals* v. *United States*, 73 Cust. Ct.

185, C.D. 4572 (1974)[1] in which it was held that the covers of a wedge-shaped cushion and a pillow with two stubby arms chiefly used to support individuals on a bed were a variety of bedding known as bolster cases within the meaning of item 363.30 of the Tariff Schedules of the United States, as modified.[2]

In these cross-motions for summary judgment plaintiff relies on the principle of *stare decisis* while defendant claims to have clearly and convincingly demonstrated the existence of error in the opinion on which plaintiff relies.[3] I cannot agree with defendant's position and I therefore consider this case appropriate for the application of the rule of *stare decisis*.

Defendant relies on the affidavits of three men involved in the manufacture of bed furnishings. The affidavits are weak, inconsistent in part with defendant's argument, somewhat self-contradictory and altogether inadequate to demonstrate the existence of error in the prior opinion or the correctness of a contrary result.

Bedding is the general statutory term which precedes and includes the term "bolster cases." The affiants' view that the articles in dispute are not bedding is not relevant because the term "bedding" is already defined in headnote 1(a) to subpart B of part 5 of schedule 3 as meaning, *inter alia* ". . . articles, by whatever name known, chiefly used as bed furnishings . . . ."

The controlling consideration is that these articles be chiefly used as bed furnishings. This proposition was held to have been proved in the prior case and defendant's evidence here has not cast doubt on the correctness of that result. In fact, two of the three affiants (Herbert and Jack Monas) are of the opinion that the stubby-armed bed rest is most accurately described as a bed furnishing for other than sleep purposes—an opinion which is entirely consistent with the result reached in the first case.

How these same affiants can then go on to state that the cover of the bed rest they have just described as a bed furnishing is not chiefly used on beds escapes my understanding. Further statements that the articles in question are "susceptible" of uses other than on a bed are deserving of no weight in the determination of actual chief use.

Defendant's additional evidence and arguments relate to the meaning of the term "bolster cases." They are continuations and elaborations of the position that bolster cases are simply one special type of pillowcase coupled with the contention that the articles in question are more in the nature of slipcovers for upholstered articles.

[1] The record of that case has been incorporated herein.

[2]

	Other bedding not ornamented:	
	Of vegetable fibers:	
	Sheets and pillowcases (including bolster cases):	
363.30	Of cotton	10.5% ad val.

[3] Defendant maintains the correctness of the classification as "other furnishings" under item 366.63, as modified, and makes an alternative claim for classification as "other bedding" under item 363.60, as modified.

I adhere to the view that the term "bolster cases," when read in the light of the comprehensive headnote definition of bedding, was not added to the tariff language for the redundant naming of one rather obscure variety of pillowcase but to describe the covers of articles chiefly used to support individuals on a bed.

For the reasons expressed above, it is

ORDERED, that plaintiff's motion for summary judgment be, and the same hereby is, granted, and it is further

DECIDED AND ADJUDGED, that the merchandise involved herein, described on the invoices in entry 121418 as bolster cases, bolster covers, bed rests or bed rests style No. 500, is properly classifiable under item 363.30 of the TSUS, as modified by T.D. 68–9, and is dutiable at the rate of 10.5% ad valorem; and it is further

ORDERED, that the district director of customs at the port of Los Angeles shall reliquidate the entry accordingly.

Protest 2704–1–003299 relating to entry 118476, having been abandoned, is dismissed.

(C.D. 4656)

LIBRASCOPE DIV. OF SINGER-GENERAL PRECISION, INC. *v.* UNITED STATES

Navigational instrument

HEAD-UP DISPLAY—OPTICAL ELEMENTS—SUBSIDIARY FUNCTIONS

An L–193 head-up display system, consisting of collimating head, electronics box, and two control boxes, manufactured in and exported from France, having the capacity, when installed in an airplane and coupled to the plane's sensors, of directing the flight of the aircraft from point of takeoff to point of landing and along a predetermined course of flight by receiving the input from the sensors and converting electrical signals into mechanical signals and flight data images which images are then projected onto a reflecting glass for viewing by the pilot, *held*, to be classifiable as claimed under TSUS item 710.46 as a navigational instrument and not under TSUS item 708.89 as an optical instrument as classified inasmuch as the optical elements incorporated in the navigational device perform only secondary, subsidiary functions.

Court No. 72–2–00423

Port of Los Angeles

[Judgment for plaintiff.]

(Decided June 15, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis* trial attorney), for the defendant.

RICHARDSON, Judge: The merchandise in this action, described on the invoice as "Navigation system type 193 No. 10", was exported

from France in March, 1969, and classified upon reliquidation at the port of Los Angeles-Long Beach, Calif. under TSUS item 708.89, as modified by T.D. 68-9 as other optical appliances and instruments at the duty rate of 36 *per centum ad valorem*. It is claimed by plaintiff that the merchandise should be classified under TSUS item 694.60, as modified by T.D. 66-9, T.D. 67-267, and T.D. 68-9 as other parts of aircraft at the duty rate of 7 *per centum ad valorem*, or alternatively, under TSUS item 710.46, as modified by T.D. 68-9 as other navigational instruments and parts thereof at the duty rate of 8 *per centum ad valorem*, or alternatively, under TSUS item 710.08, as modified by T.D. 68-9 as other optical navigational instruments at the duty rate of 22 *per centum ad valorem*.

In the pleadings it is admitted that the merchandise in issue is designed and dedicated for use in aircraft and is exclusively used in aircraft, and further, that the merchandise contains partially reflective glass on which flight information data such as the speed, the attitude, the compass heading, the rate of climb, the rate of descent, and the altitude of the aircraft, is displayed. It is also conceded in the pleadings that the merchandise in issue is not one of the articles or apparatus described in headnote 1 to Part 2C of TSUS Schedule 7 which reads in part:

> This subpart does not cover—
>
> * * * * * * *
>
> (v) electrical measuring, checking, analyzing or automatically controlling instruments and apparatus (see subpart D of this part);

The record shows that the imported merchandise, manufactured in France, consists of three units, namely, a collimating head, an adaption or electronics box, and two control boxes. When these units are installed in an airplane and coupled to the plane's sensor circuitry they function, when operated through the control boxes, in a manner which results in a display of various flight parameters upon a reflective glass positioned in the pilot's line of sight.

The electronics box receives electric impulses (sensory data) from the plane's sensors and relays them in an appropriate, useful manner to the collimating head. Motors in the collimating head operate in response to these electric impulses. The motors drive servos which move and position reticles or thin metal tapes which have images on them. An optical quartz prism in the head receives these images onto its several planes and combines them into a single image. The combined image is then put before collimating lenses which focus images at infinity onto a combining glass in front of the pilot. In this fashion the pilot is enabled to read the flight parameters while at the same

time maintaining visual contact ahead and outside of the plane. The use of the system eliminates the necessity of the pilot having to shift his eyes and constantly refocus them between instrument panel and vistas outside of the plane. Hence, the name "head-up display" is frequently used to describe the system represented by the imported merchandise.

Richard Potter, a senior staff engineer in plaintiff's employ for 20 years and in charge of systems design in 1969, testified that he reviewed all of the work done by plaintiff's engineers on the L–193 head-up display or HUD system, that the L–193 HUD gives the airplane pilot the information necessary to control, fly, and navigate his aircraft, and that it functions independently of the craft's instrument panel or head-down system (which is also coupled to the aircraft's sensor circuitry). The witness also testified that an L–193 HUD unit was bonded to the Federal Aviation Administration for a period of 3 years in connection with a certification program for HUD's which was to have been undertaken by that agency. However, funding ran out before the program was ever commenced, according to Mr. Potter.

Alvin S. White, an aerospace consultant and airplane pilot who in 1969 was employed by Trans World Airlines in flight operations research and development, testified that he evaluated and tested the L–193 HUD in Europe for TWA, and that the system provides all the flight information necessary to fly a plane from takeoff to landing. He stated that his test flight in France lasted 5 hours, of which he flew about 2 hours. Altogether, he has used HUD's in navigating an airplane for about 20 hours of flight time. The witness was of the opinion that an airplane can be navigated by the L–193 HUD, and that all the information necessary to land at airports, such as Los Angeles, where the landing procedure begins 50 miles or more out of the airport, is supplied by the system.

Louis M. Seeburger, manager of the display systems laboratory at Hughes Aircraft Company with 30 years' experience as an electrical engineer, testified that he acquired familiarity with the L–193 HUD primarily from a brochure published by plaintiff similar to exhibit 4. The witness was of the opinion that the optical features of the L–193 HUD were the primary feature of the instrument, that it does aid human vision but only for the information that is being presented by it, and that the primary purpose of the display is to navigate the aircraft.

James C. McCawley, a customs import specialist and a professional airplane pilot for 20 years with extensive training in all types of navigation, radio navigation, pilotage, dead reckoning and celestial navigation, testified that he has used navigational head-up displays

although not the L–193, and that a HUD is useful in all phases of flight from takeoff to landing. The witness also testified that celestial navigation is with reference to the stars, the planets, and the sun, and that he has worked with optical navigational instruments, which he considers to be instruments used to make star shots in celestial navigation. He stated that such instrument gives you information needed to figure out the location of the aircraft.

Plaintiff contends that the L–193 HUD is not an optical appliance because it is not a separate, independently functioning instrument. Plaintiff argues (brief, p. 16):

> . . . The projecting data images are not created by the prism or collimating head, but rather by the servo-mechanisms and the thin metal film or reticles. The prisms and collimating head only change the direction and mix the images they receive, and project them on the passive reflecting glass. Such functions are on the facts herein "subsidiary" to the purpose of the imported article and to the information system of which it is a component. . . .

Defendant contends that the L–193 is an optical instrument as that term is defined in headnote 3 of Part 2 of TSUS Schedule 7. Defendant argues (brief, p. 12):

> . . . We concede that some of the flight parameters which are displayed are scales which the pilot reads. There are other parameters, however, which are not in scale form such as the aircraft marker, the artificial horizon, the glide path, the localizer, and others . . . . Even if all the parameters were in scale form, the HUD would still come outside of the exclusion of Headnote 3 of Part 2, because the reading of the scales is not a subsidiary purpose of the HUD, but rather its primary purpose. . . .

Headnote 3 of Part 2 of TSUS Schedule 7 reads:

> The term "optical instruments", as used in this part, embraces only instruments which incorporate one or more optical elements, but does not include any instrument in which the incorporated optical element or elements are solely for viewing a scale or for some other subsidiary purpose.

Plaintiff also contends that the L–193 is part of a navigational instrument, optical or nonoptical. Plaintiff argues (brief, p. 19):

> The article in issue is manifestly employed in navigating an airplane, and when so installed and used in an airplane it is an essential component of the airplane's navigational instruments, and properly classifiable as a part thereof.

Defendant contends that the L–193 is not a nonoptical navigational instrument because it does not have sensors and an independent means of determining the position of an aircraft. Defendant also argues that the L–193 is not an optical navigational instrument because it does not measure angles, positions and other parameters, and that there is

no evidence that it is a *part* of a navigational instrument, optical or nonoptical.

Plaintiff further contends that the L–193 is part of an aircraft in that it is designed and dedicated to use in aircraft and is an essential component in navigating an aircraft. Defendant contends that the L–193 is not classifiable as part of an aircraft because there is a specific provision for such part, namely the provision for optical instruments.

On this record the court is of the opinion that the L–193 HUD is a nonoptical navigational instrument entitled to classification under TSUS item 710.46 as claimed, and so holds. There is no question in the court's mind but that the L–193 has been established by the uncontradicted testimony of an engineer who studied its design and construction and of an airplane pilot who employed it in flight to have the capability of directing the flight of an airplane from the point of takeoff to the point of landing and along a predetermined course of flight by means of devices guiding the craft to radio fixes or radio navigational devices. Such evidence conforms to the common definitions of "navigation" as laid down by the lexicons.

Further, the L–193 is, in the court's view, a complete instrument rather than a partial one even though it lacks sensors. From the evidence adduced it does not appear that sensors ever comprise a part of a navigational instrument *per se* utilized in an airplane, whether it be a head-up or a head-down instrument. The sensors and their circuitry constitute an integral part of the airplane to which any head-up or head-down navigational instrument is coupled. And the sensors, through their circuitry, merely furnish the "input" to the navigational instrument to enable it to perform its work. Consequently, to regard the L–193 HUD as being only a partial instrument because it lacks sensors would be like saying that a computer is not a complete instrument merely because it lacks program material or input. That such a conclusion is unwarranted in relation to the L–193 is further indicated by the fact that the customs authorities who examined the L–193 upon its importation treated it as a complete instrument when they classified it as an "optical instrument" under item 708.89—an item which contains no provision for parts of an instrument.

The L–193 HUD is not, in the court's opinion, an optical instrument as that term is used in Part 2 of TSUS Schedule 7, and, therefore, should not have been classified under item 708.89. The optical elements incorporated in the collimating head and in the reflecting glass perform *subsidiary* functions. They merely relay information which the system collects to the pilot by enabling the pilot to read the various scales. However, the primary work performed by the system, namely, collecting or receiving data from the sensors and its transmittal to the electronics box, and the conversion of electrical signals into mechanical

signals and images, are nonoptical functions which antedate the interplay of the optical functions.

Neither is the L-193 an optical navigational instrument in the court's view. Item 710.08 was derived from paragraphs 228(b) and 360 of the 1930 Tariff Act. *Tariff Classification Study*, Schedule 7, page 105. Insofar as optical navigational instruments are concerned (as reflected in the superior and inferior headings preceding item 710.08) the only instruments of this kind contained in the predecessor paragraph 228(b) were those used in celestial navigation, namely, azimuth mirrors, sextants, and octants—instruments utilized by a navigator to ascertain the accuracy of a compass heading or the position of a ship or aircraft in relation to celestial bodies. See and compare, *United States* v. *Bliss & Co.*, 6 Ct. Cust. Appls. 433, T.D. 35980 (1915). The information obtained by the navigator from the use of these instruments is, of course, generated by optical means. Inasmuch as the L-193 is not an instrument in this category, it does not appear to be within the ambit of item 710.08.

In view of pleading admissions to the effect that the L-193 is designed and dedicated to use in aircraft and is exclusively used in aircraft, there is no doubt that the L-193 qualifies for classification as part of an aircraft. But inasmuch as there is, in the court's opinion, a specific provision for this part, namely, the provision for navigational instruments in item 710.46, classification of this aircraft part as a navigational instrument preempts other provisions placed in contention. See Rule 10(ij), *TSUS General Interpretative Rules*.

The foregoing disposes of the issues raised in the case. For the reasons stated the claim of the plaintiff for classification of the subject merchandise under item 710.46 as a navigational instrument is sustained. Judgment will be entered accordingly.

(C.D. 4657)

CONSOLIDATED SEWING MACHINE CORP. OF CALIFORNIA *v.* UNITED STATES

On Defendant's Motion to Dismiss

Court No. 74-2-00430

Port of Los Angeles

[Motion granted.]

(Dated June 21, 1976)

Serko & Simon (*Gerald B. Horn* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*John N. Politis*, trial attorney), for the defendant.

MALETZ, Judge: On November 5, 1971, the entry involved in this action was liquidated under item 685.23 of the tariff schedules,

as modified, and duty was assessed at 11% ad valorem. On February 22, 1972, plaintiff filed a claim for relief pursuant to 19 U.S.C. 1520(c)(1) which provides for a reliquidation to correct a clerical error.[1] Plaintiff claimed that the rate of duty for item 685.23 was 10.4% rather than 11% as assessed. This claim was granted and the entry was reliquidated on March 23, 1972. Excess duties were refunded on May 17, 1972. On August 11, 1972, plaintiff filed a protest challenging the original classification of the involved merchandise.

Defendant has moved this court pursuant to rule 4.7(b)(2) to dismiss the action for lack of jurisdiction.[2] It contends that the protest, filed more than 9 months after liquidation of the entry and 141 days after reliquidation of the entry, is untimely by virtue of 19 U.S.C. 1514(b)(2) which provides:

> (2) A protest of a decision, order, or finding described in subsection (a) of this section shall be filed with such customs officer within ninety days after but not before—
> (A) notice of liquidation or reliquidation, . . .

Plaintiff opposes dismissal, asserting that its protest was in fact timely filed. In this connection, it claims that the entry papers in question contain a second liquidation stamp of May 17, 1972, which, it insists, was the date that the reliquidation occurred. Plaintiff adds that this stamp, although pencilled with an "X" through it, is prima facie evidence of the date upon which this entry was reliquidated. It therefore argues that this date of May 17, 1972 commences the running of the 90-day-limitation period and that since the protest was filed on August 11, 1972, the protest was timely.

Plaintiff further states that the Customs Service denied the protest on the merits and not on the grounds of untimeliness and that this supports its claim that May 17, 1972 was in fact the date of reliquidation.

However, plaintiff's argument that May 17, 1972 was the date of reliquidation is specious. For one thing, the actual date of reliquidation, March 23, 1972, is clearly stamped on the consumption entry. For another, examination of this entry also makes it clear that the customs officer erroneously stamped thereon the date of the refund, May 17,

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[1] 19 U.S.C. 1520(c)(1) provides.

(c) Notwithstanding a valid protest was not filed, the appropriate customs officer may, in accordance with regulations prescribed by the Secretary, reliquidate an entry to correct—

(1) a clerical error, mistake of fact, or other inadvertence not amounting to an error in the construction of a law, adverse to the importer and manifest from the record or established by documentary evidence, in any entry, liquidation, or other customs transaction, when the error, mistake, or inadvertence is brought to the attention of the customs service within one year after the date of entry, or transaction, or within ninety days after liquidation or exaction when the liquidation or exaction is made more than nine months after the date of the entry, or transaction; . . .

[2] Rule 4.7(b)(2) provides:

(b) **Defenses: How Presented:** The following defenses may be made by a motion to dismiss the action: . . . (2) lack of jurisdiction of the subject matter; . . . A motion making any of these defenses may be made before answer.

1972, as the date of the liquidation notwithstanding that that entry already bore the stamp "liquidated Nov. 5, 1971." It is apparent from the pencilled "X" running through the stamp stating "liquidated May 17, 1972" that this error was recognized. Furthermore, the possibility of May 17, 1972 being the actual date of liquidation is totally untenable. For that would result in the absurd situation of the reliquidation—which (as previously mentioned) took place on March 23, 1972—occurring *prior* to the date of liquidation.

But even assuming arguendo that plaintiff is correct in terming the May 17, 1972 date to be the date of reliquidation, its protest was still untimely filed. This is underscored by 19 U.S.C. 1514(c) which specifically provides:

> (c) . . . The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the customs officer upon any question not involved in such reliquidation.

In this setting, the reliquidation herein concerned only the ad valorem rate to be applied under the liquidated classification. Hence a protest involving the original classification was not within the scope of this reliquidation.

Plaintiff's further reliance for jurisdiction on the fact that the Customs Service denied the protested classification on the merits has no basis. For this error by the Customs Service in overlooking the untimeliness of the protest and denying it on the merits cannot confer jurisdiction on this court where none in fact exists. 19 U.S.C. 1514 mandates that classification decisions made by the Customs Service shall be final and conclusive unless a protest is filed within 90 days of liquidation. If, as here, this prerequisite is not met this court lacks jurisdiction.

In accordance with the foregoing, defendant's motion to dismiss the action is granted and the action is hereby dismissed.

(C.D. 4658)

PASCO TERMINALS, INC. *v.* UNITED STATES

On Defendant's Motion to Dismiss

Court No. 74-5-01357

Dumping duties on sulphur

Ports of Philadelphia and Wilmington

[Motion granted.]

(Dated June 21, 1976)

Williams, Connolly & Califano (*J. Alan Galbraith* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Velta A. Melnbrencis*, trial attorney), for the defendant.

MALETZ, Judge: Defendant has moved pursuant to rule 4.7(b) (1) and (2) to dismiss the present action for lack of jurisdiction on the ground that plaintiff is neither an importer, consignee or authorized agent within the meaning of section 514 of the Tariff Act of 1930, as amended (19 U.S.C. 1514),[1] and hence lacked standing to file the protests herein and, upon their denial, to invoke the jurisdiction of this court under 28 U.S.C. 1582, as amended.[2]

The action to which this motion is addressed involves the validity of the assessment of dumping duties on four entries of crude sulphur in bulk exported from Coatzacoalcos, Veracruz, Mexico aboard the *S.S. Harold H. Jaquet* and imported through the ports of Philadelphia, and Wilmington.

The issue raised by defendant's motion to dismiss, i.e., whether Pasco is a proper party plaintiff herein, has its origin in an Antidumping Proceeding Notice published on April 6, 1971 by the Secretary of the Treasury in connection with elemental sulphur exported from Mexico (36 Fed. Reg. 6526). On November 6, 1971, the Bureau of Customs (now renamed the Customs Service) published a Withholding of Appraisement Notice (36 Fed. Reg. 21364) in connection with elemental sulphur exported from Mexico to commence on November 7, 1971. On February 5, 1972, the Office of the Secretary of the Treasury published a determination (37 Fed. Reg. 2793), dated February 3, 1972, that elemental sulphur from Mexico was being, or likely to be, sold at less than fair value. On May 4, 1972, the Tariff Commission (now renamed the International Trade Commission) notified the Secretary of the Treasury that an industry in the United States was being injured by reason of imports from Mexico of sulphur sold or likely to be sold at less than fair value.

On May 10, 1972, the Tariff Commission published its opinion determining injury (37 Fed. Reg. 9417), and on June 28, 1972, the Assistant Secretary of the Treasury published a finding of dumping with respect to such sulphur (37 Fed. Reg. 12727; T.D. 72–179).

Prior to the commencement of the dumping investigation, a sales agreement had been entered into on February 17, 1970 among Azufrera Panamericana, S.A. (Azufrera), a Mexican corporation, E. I.

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[1] Section 514, as amended by the Customs Courts Act of 1970, provides that certain specified administrative decisions of the appropriate customs officer shall be final and conclusive upon all persons unless—

(a) . . . a protest is filed in accordance with this section, or unless a civil action contesting the denial of a protest, in whole or in part, is commenced in the United States Customs Court . . . .

and that—

(b)(1) . . . protests may be filed by the importer, consignee, or any authorized agent of the person paying any charge or exaction, ...

[2] Section 1582, as amended, *supra*, provides, in pertinent part, that this court—

(a) . . . shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer, ...

• • • • • • • •

(c) . . . shall not have jurisdiction of an action unless (1) either a protest has been filed, as prescribed by section 514 of the Tariff Act of 1930, as amended, and denied . . . .

DuPont de Nemours and Company (DuPont), a Delaware corporation, and Caribbean Sulphur Shipping Company, Limited (Caribbean) a Bahamian shipping company wholly owned by Azufrera. Under its terms (1) DuPont agreed to purchase from Azufrera at least 80% of its crude sulphur requirements for use at two of DuPont's plants in New Jersey; (2) Azufrera agreed to deliver the sulphur to its docks at Coatzacoalcos, Veracruz, Mexico and there to load same onto vessels supplied by Caribbean; (3) title to the sulphur and risk of loss thereof was to pass from Azufrera to DuPont when the sulphur was loaded onto the vessels at Coatzacoalcos; (4) Caribbean agreed to accept delivery of the sulphur at Coatzacoalcos in vessels provided by it and to transport and deliver same to docks provided and maintained by DuPont; (5) Caribbean agreed to be fully responsible for the safety and care of DuPont's sulphur from the time of loading at Coatzacoalcos until its discharge at DuPont's docks; (6) Caribbean agreed to obtain at its expense ocean marine cargo insurance from companies acceptable to DuPont for protection of itself and DuPont, and further agreed that the policies would name DuPont as an additional insured and provide for at least 10 days' prior written notice to the latter of any change in or termination of coverage; (7) the sum of $34.50 per long ton, which was to be paid to Azufrera and Caribbean collectively for each long ton sold under the contract, included payment both to Azufrera of the purchase price and to Caribbean for transporting the merchandise in accordance with requirements; (8) payment was to be made solely to Azufrera, or its order, as payment in full to both Azufrera and Caribbean which would make their own arrangements for remission of the transportation charges to the latter; (9) import licenses and any import duties or charges for importation of the sulphur sold under the contract into the United States were to be the responsibility of DuPont.

The sales agreement was extended through 1971 on the same terms and conditions except for a reduction in the delivered sales price to $28.50 per long ton.

Apparently, all parties to the agreement were satisfied with its terms until publication on November 6, 1971 of the Withholding of Appraisement Notice, which created, as plaintiff put it, "a new set of commercial realities." See p. 4 of plaintiff's memorandum replying to defendant's motion to dismiss. Although, under item 415.45 of the tariff schedules, crude sulphur entered the United States free of duty, the contracting parties were aware that the requisite investigations and determinations made by the Secretary of the Treasury and the Tariff Commission pursuant to section 201(a) of the Antidumping Act of 1921 (19 U.S.C. 160(a)), might result, as they ultimately did, in the publication of a finding of dumping. In that event, dumping duties would be imposed on all imports of such merchandise commencing with crude sulphur entered after November 6, 1971 with respect to

which appraisement was being withheld. Moreover, since the sales agreement provided that DuPont took title at Coatzacoalcos to the sulphur it purchased from Azufrera and also assumed liability for all import duties, DuPont would be liable for any dumping duties which might be assessed upon the crude sulphur it entered, or withdrew from warehouse, for consumption after November 6, 1971.

DuPont, however, which had contracted to pay $28.50 per long ton, would not, plaintiff claims, have taken delivery of the merchandise subject to a contingent dumping liability. Accordingly, as plaintiff's counsel stated during oral argument on the present motion, there was a decision to "take DuPont off the hook" (R. 39). Inasmuch as Pasco was wholly owned by Azufrera, and was authorized to do business in New Jersey where the merchandise was to be delivered—

> . . . the management of Azufrera and Pasco Terminals resolved upon a simple plan, agreed to by DuPont: instead of making the sale to DuPont, Azufrera would make the sale to Pasco Terminals, a wholly owned subsidiary. *After* importation, Pasco Terminals would, in turn, make the sale to DuPont. [Plaintiff's memorandum p. 4. Emphasis in original.]

As part of this plan, Pasco was to be substituted for Azufrera as seller under the sales agreement. Pasco was also to be the "importer" of the merchandise and liable for all dumping duties that might thereafter be imposed, thus relieving DuPont of any such obligation under the 1970 contract.

The plan also served another purpose. It avoided, by reason of what plaintiff's counsel claimed to be the administrative practice of the Customs Service (R. 24–26), the effect of 19 U.S.C. 160–162 which makes it clear that in calculating purchase price or exporter's sales price there shall be deducted the amount of any special dumping duties which are, or will be, paid by the manufacturer, producer, seller, or exporter, or which are, or will be, refunded to the importer by the manufacturer, producer, seller or exporter, directly or indirectly. See 19 CFR 153.49(a).[3] Since the dumping duty is measured by the difference between the "foreign market value" and the lesser purchase price or exporter's sales price, as the case may be, the result of decreasing the purchase price or exporter's sales price is to *increase* the dumping duty by an equal amount. It is further to be noted that 19 U.S.C. 161 mandates the levying and collection of such dumping duties upon *all* unappraised merchandise—subject to a dumping find-

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[3] In this connection, 19 CFR 153.56 provides that—

. . . If it appears that the merchandise is imported by a person who is the exporter within the meaning of such section 207, where the exporter's sales price is less than foreign market value, the special dumping duty shall equal the difference between the exporter's sales price and the foreign market value on the date of exportation, or, if there is no foreign market value, between the exporter's sales price and the constructed value, any foreign currency involved being converted into U.S. money as of the date of exportation.

Under section 207 of the Antidumping Act, 1921 (19 U.S.C. 166), an "exporter" of imported merchandise includes a person owned or controlled by the manufacturer or producer.

ing—that was entered, or withdrawn from warehouse, for consumption, *up to 120 days* before the question of dumping was raised by or presented to the Secretary.

Plaintiff contends that the following events ensued, in the order listed: (1) the plan became effective on November 8, 1971; (2) it purchased the sulphur involved in the four entries herein from Azufrera on November 9 and December 6, 1971; (3) Dunnington and Arnold of Philadelphia, Inc. (sometimes hereafter referred to as "D & A"), a customhouse broker, acted as plaintiff's agent and arranged, pursuant to instructions, for entry of the merchandise as nominal owner, naming (or intending to name) plaintiff as ultimate consignee; and (4) after importation, plaintiff sold the sulphur to DuPont.

On the basis of the foregoing commercial and customs transactions, plaintiff claims to be the appropriate party under section 514, *supra*, to file the protests herein and to commence the instant action under section 1582, *supra*.

As evidence of the plan to modify the sales agreement and to relieve DuPont of any liability for dumping duties, plaintiff relies upon a letter, dated December 3, 1971, from Marlin E. Sandlin, vice chairman of the board and chief executive officer of Azufrera addressed to Robert P. French of DuPont's Purchasing Department, which reads as follows:

Gentlemen:

> This will confirm our agreement effective November 8, 1971, to substitute our wholly owned subsidiary, Pasco Terminals, Inc., for Azufrera Panamericana, S.A., as the Seller under our Sulphur Sales Agreement with you dated February 17, 1970.
>
> The effect of this Supplemental Agreement is to enable Pasco Terminals, Inc., to act as the importer of our sulphur sold and delivered to you in the United States and to relieve you of any liability or obligation under the Antidumping Act with respect to sulphur sold and delivered to you in the United States.
>
> Pasco Terminals, Inc., will comply with whatever requirements may be imposed by the Bureau of Customs of the Treasury Department of the United States with respect to such sulphur deliveries.
>
> If the above and foregoing is in accordance with your understanding of our agreement, please indicate your acceptance in the space provided below.

The notation below Marlin E. Sandlin's signature states:

> ACCEPTED, this the 28th
> December, 1971.
> E. I. duPont de Nemours & Co., Inc.
> By: [signature illegible]
> DIRECTOR
> Purchasing Department

Plaintiff also relies upon another letter, dated November 9, 1971, prepared by M. Brito of International Chartering Services, Inc. (International), as agent for Caribbean, and addressed to Lavino Shipping Co. (Lavino), its steamship agent in Philadelphia, which instructed Lavino to arrange for entry of the sulphur shipped on the *Harold H. Jaquet*, as follows:

S/S "HAROLD H. JAQUET" V/153

Gentlemen:

This confirms our telephone conversation of yesterday, whereby we informed you that commencing with the next arrival of the subject vessel at Thompson's Point and Deepwater Point on November 16, 1971, you should use the value of $28.50 per L.T. CIF on Azufrera Panamericana's Invoices for Customs Cargo Entry purposes.

We are detailing below the value distribution which should be shown in the invoices:

F.O.B. Value Coatzacoalcos	$23.00
Insurance	.10
Freight	5.40
	$28.50

We wish to remind you again that these invoices are for Customs Entry and internal purposes only and are not to be delivered to; shown to; or discussed with any customer.

Also, commencing immediately and until otherwise instructed by us, please show in Azufrera Panamericana's invoices Pasco's Terminal and the discharging port as Importer of the cargoes.

As requested in our telephone conversation yesterday, you will arrange to have your Custom House Broker post with each local Custom House an Anti Dumping Bond under the name of Pasco's Terminal, which will guarantee the payment of any duty and we understand from our conversation that Customs require a Bond for the 10% of the value of the cargo and the cost will be $0.50 per $1,000.00 with a minimum of $10.00.

Please have this additional Bond charge included in the regular Port Disbursements Account to us.

Thanking you for your cooperation on this matter, we remain,

It appears that Lavino, acting upon the foregoing instructions,[4] thereupon prepared four commercial invoices on Azufrera's letterhead

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[4] A letter dated May 5, 1975, from M. W. Mathiasen of Lavino to the U.S. Department of Justice, Customs Section, states, in pertinent part:

. . . Dunnington and Arnold were engaged and paid by Lavino Shipping Company, As Agents, to prepare Customs Entry papers for this shipment. We do not have copies of the entries on file and therefore cannot verify the entry numbers.

In accordance with the instructions from our principals, we prepared the invoices, copies of which are attached.

Also enclosed is a copy of the cargo receipt which was used in lieu of bill of lading.

billing Pasco for two sales of crude sulphur (covered by entries 003575 and 062A) on November 9, 1971 and for another two sales of crude sulphur (covered by entries 066A and 004007) on December 6, 1971.[5]

Lavino also engaged Dunnington and Arnold to arrange for entry of the sulphur and supplied the latter with the commercial invoices it had prepared for Azufrera and which were the basis for the four entries subsequently filed with the Bureau of Customs. D & A then entered the merchandise as importer of record and nominal consignee for DuPont on entry 003575 [6] and for Pasco on the other three entries, as follows:

Entry No.	Importer of Record	Date of Exportation	Date of Importation	Date of Entry
003575	Dunnington and Arnold of Philadelphia, Inc., for account of E. I. DuPont De Nemours	10–13–71	11– 1–71	11–29–71 Philadelphia, Pa.
062A	Dunnington and Arnold of Phila., Inc., for account of Pascos Terminal	11–11–71	11–16–71	11–18–71 Wilmington, Del.
004007	Dunnington and Arnold of Philadelphia, Inc., for account of Pascos Terminal	11–30–71	12– 8–71	12–14–71 Philadelphia, Pa.
066A	Dunnington and Arnold of Philadelphia, Inc., for account of Pascos Terminal, Inc.	11–30–71	12– 9–71	12–29–71 Wilmington, Del.

[5] An affidavit of Rodolfo Cruz Miramontes, general counsel of Azufrera and secretary of Azufrera's wholly-owned subsidiaries, Pasco and Caribbean, states that Pasco's records "reflect" that it "purchased sulphur from Azufrera on November 9, 1971 and December 6, 1971, f.o.b. Coatzacoalcos, Veracruz," as shown by the consumption entries herein.

[6] Dunnington and Arnold's vice president, James A. McCauley, states in an affidavit (p. 3) that the stenographer "should have typed in 'Pasco Terminals, Inc.' " instead of DuPont on entry 003575. He also states that there were two shipments of sulphur, but the cargo aboard each shipment was to be discharged at two different points in New Jersey (p. 2). However, the entries do not bear this out. In fact, there were three shipments from Mexico on the *Harold H. Jaquet;* the first (entry 003575) left Coatzacoalcos on 10–13–71; the second (entry 062A) left that port on 11–11–71; and the third (entries 066A and 004007), which had cargo destined for both Deepwater Point and Thompson's Point in New Jersey, left Coatzacoalcos on 11–30–71.

As no owner's declaration and superseding bond were filed pursuant to section 485(d) of the Tariff Act of 1930 (19 U.S.C. 1485(d)),[7] D & A became liable to the government for any additional or increased duties levied against the merchandise. The entries were liquidated on October 26, 1973 and D & A was billed for the dumping duties assessed therein. Pasco paid the duties assessed in entries 062A, 066A and 004007, and reimbursed D & A for payment of the duties levied in entry 003575.

Plaintiff vigorously urges that its claims respecting the supplemental commercial agreement and the change in entry for customs purposes of the merchandise are fully substantiated by the aforementioned documents. Nonetheless, we find that examination of the cited documents in the light of other papers appended to the motions herein[8] places the alleged transactions in a somewhat different perspective.

For example, backtracking through the chain of command which resulted in the preparation of the instant entries by D & A, we note that the entries were based upon invoices prepared by Lavino upon instructions from its "principals," M. Brito of International, as agent for Caribbean. International, we are advised, had in turn received its instructions "from Warren H. Lansford that the cargo was to be imported by Pasco . . . ." See affidavit of M. Brito, p. 1. Lansford at that time was a director and secretary-treasurer of Pasco. See plaintiff's response to defendant's interrogatory 1(a) (contained in defendant's collective exhibit H) directed to Pasco. However, so far as can be ascertained, he served in no official capacity as an officer or employee of any party to the original sales agreement.

In other words, the instructions to International were not initiated by a party to the agreement, but by Pasco through its officer-director, Lansford. We find no judicial or statutory authority, in the absence of an authorized agency, for modification of an agreement by another who is a stranger thereto.

In this connection, it is noted that the sole evidence of the supplemental agreement between Azufrera and DuPont that became effective November 8, 1971 is the letter written almost four weeks later, on December 3, 1971. Apart from this letter, among the many exhibits submitted, there is not a single direct statement in affidavit

[7] Section 485(d) provides that—

(d) A consignee shall not be liable for any additional or increased duties if (1) he declares at the time of entry that he is not the actual owner of the merchandise, (2) he furnishes the name and address of such owner, and (3) within ninety days from the date of entry he produces a declaration of such owner conditioned that he will pay all additional and increased duties, under such regulations as the Secretary of the Treasury may prescribe. Such owner shall possess all the rights of a consignee.

[8] Plaintiff had moved for hearing and oral argument on defendant's motion to dismiss and appended additional documentary exhibits to its moving papers. Plaintiff's motion was granted and oral argument was held on November 25, 1975. Additional briefs were thereafter submitted pursuant to court order.

or other form from anyone, let alone any officer or employee of Azufrera, DuPont or Caribbean alleging that he was a participant in or a party to the supplemental agreement or had personal knowledge thereof.[9]

It is further significant that a memorandum dated November 8, 1971,[10] prepared by an attorney with the law firm appearing as plaintiff's counsel herein and his letter of *November 9, 1971* to Sandlin of Azufrera,[11] advising that it would be appropriate for either Azufrera or Pasco to act as importer of record for Azufrera's sulphur shipments to the United States and, in that capacity, to file any bonds required by Customs, is hardly consistent with the claim that a supplemental agreement was entered into on *November 8, 1971*. The point is that on November 9, 1971, plaintiff's counsel advised Azufrera as to what arrangements *could be made* with respect to entering the merchandise, and yet, according to plaintiff, such arrangements *had already been made on November 8, 1971* by virtue of a claimed supplemental agreement.

We turn now to the commercial invoices which are the backbone of plaintiff's claim that the supplemental agreement was carried out so that, as plaintiff's counsel stated on oral argument (R. 24–25):

> . . . the transaction was a sale by Azufrera to Pasco *in Coatzacoalcos*, Pasco entered the merchandise into the United States, and *then* a sale by Pasco to DuPont. [Emphasis added.]

It is noted, with respect to the merchandise covered by entry 003575, that Azufrera's invoice to Pasco shows a sale of 6400 long tons of crude sulphur in bulk, f.o.b. Coatzacoalcos, at $23.00 per ton,

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[9] The answers to defendant's interrogatories indicate that Sandlin is deceased and that Lansford is no longer associated with Pasco.

[10] The memorandum reads in pertinent part:

To: The File

Re: Posting of Bond in Azufrera Matter

I reviewed the pertinent statutes and regulations under the Antidumping Act of 1921, as amended, in order to determine whether, upon the publication of Notice of Withholding, Azufrera could itself post the bond required by 19 CFR § 153.54. . . .

* * * * * * *

I did not mention to Mr. Flynn [of the Customs Service] the concept of making all sales to Pasco Terminals but it would follow that if Azufrera's representative himself could post the bond to Customs, a wholly separate corporate entity such as Pasco Terminals could post the bond.

Based on the foregoing I would conclude that *we advise Azufrera to invoice all of its United States sulphur sales through Pasco Terminals, Inc.*, and deal with the bond matter accordingly. . . . [Emphasis added.]

[11] The letter reads in pertinent part:

Dear Mr. Sandlin:

You have asked that we advise you whether Azufrera, any of its United States agents, representatives or subsidiaries could, under the Antidumping Act of 1921, as amended, and the regulations promulgated thereunder post the bond required upon publication of a six month Withholding of Appraisement Notice.

* * * * * * *

. . . Based upon conversations with Customs officials, and later confirmation by said officials that their earlier advice to us was correct (see Memorandum to File enclosed herewith which sets forth the substance of these conversations) *we would consider it appropriate for Azufrera or its subsidiary, Pasco Terminals, Inc., to act as the importer of record for Azufrera's sulphur shipments to the United States* and to furnish, in that capacity, the bond which, after the publication of the Withholding of Appraisement Notice, might be required by the District Director of Customs. [Emphasis added.]

plus insurance and freight charges of $5.50, totalling $182,400.00, and is dated November 9, 1971. In turn, Pasco's invoice to DuPont shows a sale to the latter of 6320.080 long tons for $180,122.28 and is dated November 10, 1971. See invoice No. 1368 in defendant's collective exhibit I.

The problem with these invoices is that they show sales of a sulphur shipment which had already been exported from Coatzacoalcos on *October 13* and imported into the United States on *November 1, 1971, prior* to the supplemental agreement. In other words, under the original sales agreement, title had already passed to DuPont on or about October 13 when the merchandise was loaded aboard the *Harold H. Jaquet.* Furthermore, Lavino was instructed by International, in its letter of November 9, 1971, cited *supra*, to prepare Azufrera's invoices "for Customs Cargo Entry purposes," commencing with the next arrival of the vessel "at Thompson's Point and Deepwater Point on *November 16, 1971* . . . ." [Emphasis added.]

Apparently there was no intention initially to include a shipment that had already been landed in the United States. Accordingly, the invoices covering entry 003575 which purport to show (1) a sale by Azufrera to Pasco on November 9, 1971—eight days after the actual importation; and (2) a sale by Pasco to DuPont on November 10, 1971, a day later, are a total fiction.[12] These were phantom transactions.

The consumption entry, made out by D & A, allegedly by mistake, to the account of DuPont in fact reflects the true nature of the transaction. DuPont was indeed the owner or consignee of the merchandise and, for customs purposes, Pasco's relationship to this entry, although it reimbursed D & A for the duties, is that of a volunteer.[13] In this capacity, Pasco clearly had no standing, as importer, consignee or agent under section 514, *supra*, to file a protest and hence, with regard to this entry, has no standing to invoke the jurisdiction of the court. See e.g., *T. W. Holt & Co.* v. *United States*, 28 Cust. Ct. 504, 506, Abs. 56756 (1952), *aff'd* 41 CCPA 8, C.A.D. 522; *E. H. Corrigan* v. *United States*, 35 CCPA 10, 18, C.A.D. 364 (1947); *Top Form Brassiere Mfg. Co.* v. *United States*, 68 Cust. Ct. 288, 301 R.D. 11770, 342 F. Supp. 1167 (1972). See also *Stahlmann* v. *Vidal*, 305 U.S. 61, 64 (1938).

Turning to entries 004007 and 066A, it is noted that the former covers 2500 long tons of sulphur exported from Coatzacoalcos on

[12] Azufrera's invoice to Pasco covering entry 003575 incorrectly lists November 11, 1971, instead of October 13, 1971, as the date of shipment.

[13] The merchandise was not entered until November 29, 1971. We find no support in the record for plaintiff's counsel's claim, specious on its face, that the merchandise was subject to antidumping duty only because of failure of the Customs Service to process the entry "promptly" (R. 35). The declaration of D & A as nominal consignee is dated November 23, 1971, long after the Withholding of Appraisement Notice.

November 30, 1971 and imported into the United States on December 8, 1971, with delivery made at Thompson's Point, New Jersey, and that the latter covers 1324 long tons of sulphur also exported on November 30, 1971 on the same vessel and imported on December 9, 1971 with delivery at Deepwater Point, New Jersey.

Azufrera's invoices to Pasco, which were filed with the entries, are dated December 6, 1971, and show (1) with respect to entry 004007 a sale, f.o.b. Coatzacoalcos, to Pasco of 2500 L/T of crude sulphur, totalling $71,250.00, including insurance and freight, shipped to Thompson's Point, New Jersey and (2) with respect to entry 066A a sale, f.o.b. Coatzacoalcos, to Pasco of 1324 L/T of crude sulphur, totalling $37,734.00 freight and insurance included, delivered to Deepwater Point, New Jersey. The affidavit of Miramontes, as previously observed (note 5, *supra*) states that this sulphur, according to Pasco's records, was purchased by Pasco on December 6, 1971, as shown by the invoices.

Accordingly, at the time of exportation on November 30, 1971 of the merchandise covered by these two entries, Azufrera was not only the exporter but the owner of the goods until the sale to Pasco on December 6. However, under the original sales agreement, DuPont was to take title to the merchandise from Azufrera at the time of lading at Coatzacoalcos, assume the risk of loss, and be covered by cargo insurance issued by a company it approved. But the supplemental agreement makes no provision whatever for the change in the circumstances of the involved parties to the original agreement and of Pasco's subsequent involvement. Thus, totally lacking in the supplemental agreement is any provision as to who would bear the risk of loss and be covered by cargo insurance when the vessel left the Mexican port on November 30. Nor is there a scintilla of evidence in the record as to these matters or indeed any indication that any changes with respect thereto were ever made. Instead, the court is called upon to assume, in the absence of any proof, that all aspects of the transactions provided for under the original agreement were changed, where necessary, in order to carry out the so-called supplemental agreement.[14]

It is also to be noted that Pasco's invoices 1374 and 1375, which relate to entries 004007 and 066A, respectively, bill DuPont in the amount of $71,696.03 for 2515.650 L/T of "Crude sulphur (liquid) delivered to you at Thompson's Point, N.J., aboard the S.S.H.H. Jaquet #154," and for $36,451.50 for 1279.000 L/T "Crude sulphur (liquid) delivered to you at Deepwater Point, N.J., aboard the

[14] Plaintiff asserts in its memorandum, p. 5, that "inconsistent language in the underlying sulphur sales contract must yield to the written expression in the December 3, 1971 letter of agreement" [i.e., the supplemental agreement], without even attempting to explain how the provisions were changed to accommodate the new commercial reality.

S.S.H.H. Jaquet #154."[15] Both invoices are dated November 30, 1971 (coincidentally the date of exportation), some six days before the alleged sales of the sulphur on December 6 from Azufrera to Pasco and eight days before the merchandise was imported into the United States.

While a party is not precluded from selling after-acquired property, with title to pass upon delivery, the invoices alone, in the absence of corroborative evidence, do not appear to support plaintiff's claim in its memorandum, p. 9, that, under the supplemental agreement, "DuPont was *both purchasing* and taking title to the sulphur in the United States *after importation.*" [Emphasis added.]

Furthermore, it is inexplicable that merchandise which had already been imported into the United States by Pasco for delivery to Thompson's Point and Deepwater Point would thereafter be sold, as plaintiff claims, to DuPont on a "c.i.f. Thompson's Point" and "c.i.f. Deepwater Point" basis. See plaintiff's response to defendant's interrogatory 5(f) contained in defendant's collective exhibit H. The original 1970 sales agreement provides that it shall be construed in accordance with the laws of the State of New York. Section 2–320(1) of the New York Uniform Commercial Code (McKinney 9164)[16] provides:

> (1) The term C.I.F. means that the price includes in a lump sum the cost of the goods *and the insurance and freight* to the named destination. . . .[Emphasis added.]

It is a general rule that, though the seller is required to prepay or credit the cost of transportation, under a c.i.f. contract, the title and consequent risk of loss pass to the buyer upon delivery of the goods on board at the *port of shipment.* See Bugan, *When Does Title Pass from Shipper to Consignee and Who Has Risk of Loss or Damage in Transportation* p. 333 (1951). Plaintiff has not disclosed what arrangements were made with DuPont to avoid the usual ramifications of a purchase on a c.i.f. destination basis.

We also find it significant that, while the record is replete with the details of Pasco's payment (and reimbursement to Dunnington and Arnold in one instance) of the dumping duties, it is curiously silent as to whether, when and how plaintiff paid Azufrera for the

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[15] No explanation is given for variations in the weights and charges between Azufrera's invoices to Pasco and Pasco's invoices to DuPont.

[16] See also N.Y. U.C.C. 2-320(2) (McKinney 1964) delineating the obligations of the seller under a contract using "the term C.I.F. destination or its equivalent . . .," unless otherwise agreed upon. The official Comment of the National Conference of Commissioners on Uniform State Laws and the American Law Institute, states, with regard to this text (N.Y. U.C.C. at 333, McKinney 1964):

Purposes: To make it clear that:

1. The C.I.F. contract is not a destination but a shipment contract with risk of subsequent loss or damage to the goods passing to the buyer upon shipment if the seller has properly performed all his obligations with respect to the goods. Delivery to the carrier is delivery to the buyer for purposes of risk and "title". . . .

merchandise and Caribbean for the shipping charges. Furthermore, the circumstances of DuPont's payment for the sulphur are undisclosed. In this connection, we are constrained to note that DuPont, the beneficiary of these transactions, remains mute. There is nothing on this record by way of testimonial or documentary evidence adduced from an officer or employee of DuPont to verify plaintiff's claims herein.

In short, we find that the affidavits and other documentary evidence relied upon by plaintiff lack specificity and a direct familiarity with the alleged transactions.

We do not think undue emphasis has been placed upon the nature of the evidence offered to meet plaintiff's burden of establishing the existence of the alleged transactions pursuant to the claimed supplemental agreement. The customs laws and regulations require, for reasons that should be unnecessary to expound upon, that form and appearance comport with reality. In other words, when entries of merchandise are made, as here, based upon commercial transactions, the entries, invoices and other documents filed therewith must accurately reflect the actual transaction that took place. Furthermore, any right which a party may have under the laws to file a protest or to commence an action in this court is based upon his relationship, as defined by statute, with respect to that transaction.

Accordingly, taking into account all of the circumstances surrounding the alleged transactions as revealed by the documents submitted herein, including the fabricated invoices submitted in connection with entry 003575; the lack of any direct confirmation of the alleged supplemental agreement or that it became effective on November 8, 1971; the fact that the invoices prepared for entries 004007 and 066A were for alleged sales which did not even accord with plaintiff's claims; and the absence of any corroborative evidence of those sales, we are compelled to conclude that plaintiff has failed to establish that it was in fact "commercially" an importer or consignee of the merchandise.

Nor was plaintiff an importer [17] or consignee in law. Dunnington and Arnold, which entered the merchandise as importer of record and nominal consignee and indisputedly was liable to the government for the payment of the duties, was the importer and sole consignee for tariff purposes. See section 483 of the Tariff Act of 1930 (19 U.S.C. 1483).[18] Since no owner's declaration and superseding bond were filed,

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[17] Plaintiff also became aware of its lack of standing as an "importer" and amended its complaint to allege that it was "the consignee of the merchandise" and not, as formerly claimed, "the importer of record."

[18] Section 483 provides in part that—

For the purposes of this subtitle—

(1) All the merchandise imported into the United States shall be held to be the property of the person to whom the same is consigned; and the holder of a bill of lading duly indorsed by the consignee therein named, or, if consigned to order, by the consignor, shall be deemed the consignee thereof. The underwriters of abandoned merchandise and the salvors of merchandise saved from a wreck at sea or on or along a coast oft he United States may be regarded as the consignees.

D & A was the sole statutory consignee and hence acquired all the rights of a consignee under the tariff laws, including the right to file a protest under section 514. See *Top Form Brassiere Mfg. Co., Ltd.* v. *United States, supra*, 68 Cust. Ct. 288, and cases cited therein.

Furthermore, even applying the most liberal construction of *United States* v. *Wedemann & Godknecht, Inc., a/c Atwater Throwing Co., et al.*, 62 CCPA 86, C.A.D. 1151, 515 F. 2d 1145 (1975), relied upon by plaintiff, we do not find that plaintiff was, for purposes of section 514, an "agent of the person paying any charges." Indeed, in its memorandum, p. 6, plaintiff's primary contention is that "through a chain of command Dunnington & Arnold was acting at the explicit bidding of Pasco Terminals."

Nor will the equities of the situation allow us to permit plaintiff, as its counsel has suggested (R. 37), to have Dunnington and Arnold go through the act of appointing Pasco as its agent for the purpose of ratifying the latter's acts, i.e., filing of the protests and commencement of the suit herein. For Pasco's role, as it appears on this record, was to serve on paper as the phantom conduit through which illusory transactions were to be funneled to avoid payment by DuPont of any dumping duties.[19] Consequently, to countenance such a charade would be tantamount to subversion of the tariff statutes.

Turning to the remaining entry, number 062A, we note that it covers 4000 L/T of sulphur exported on November 11, 1971, imported on November 16, 1971 and delivered to Deepwater Point. Azufrera's invoice accompanying the entry is dated November 9, 1971, and Pasco's invoice No. 1369, which bills DuPont in the amount of $116,194.56 for 4077.002 L/T of "Crude sulphur (liquid) delivered to you at Deepwater Point, N.J. abaord [sic] the SS H.H. Jaquet #153," is dated November 10, 1971. Thus, the invoices show a sale from Azufrera to Pasco and a resale from Pasco to DuPont *prior to* exportation of the merchandise. The fact, too, that the resale to DuPont was characterized by plaintiff as "c.i.f. Deepwater Point" further demonstrates that this resale took place in Mexico. However, this is totally at odds with plaintiff's claim that Pasco's sale to DuPont did *not* take place until *after* importation. See memorandum, p. 4; R. 24–25. Therefore, the penumbra of uncertainty and doubt raised in connection with the other three entries looms over this one as well, inasmuch as all were conceived as part of the same scheme. Therefore, in light of the circumstances surrounding these entries, it is clear that plaintiff has failed to show by competent satisfactory proof that it is the importer, consignee or agent as required by 19 U.S.C. 1514.

[19] Also to be noted is plaintiff's success in avoiding assessment of double dumping duties as required by 19 C.F.R. 153.49 and 153.56, *supra*, although these regulations were applicable to it as an "exporter" under section 207 of the Antidumping Act of 1921 (19 U.S.C. 166).

In conclusion, based on the exhibits, entry papers and accompanying documents, we find that plaintiff has failed to establish that it had standing under 19 U.S.C. 1514 to file the protests herein. Consequently it has failed to meet the jurisdictional prerequisites of 28 U.S.C. 1582(c)(1). Defendant's motion to dismiss is granted and the action is dismissed.

(C.D. 4659)

RUSS BERRIE & CO., INC. *v.* UNITED STATES

Dolls—Papier-mache figures

Papier-mache figures consisting of miniature figures of small girls coyly posed in an amusing manner, with various inscriptions taped thereon, such as "happy birthday," "Get Well Soon," "I LOVE YOU," etc., *held* properly classified by the government as dolls under item 737.20.

DOLLS

The provision in the tariff schedules covering dolls is an *eo nomine* rather than a use provision and covers all forms of the article.

DOLLS

A doll for tariff purposes is not confined to toys or playthings for children but includes a wide range of other articles including but not limited to dolls for ornamentation, souvenir or prize dolls, dolls for display, advertising purposes, and dolls sold as gag items, adult novelties, etc.

Court No. 72-4-00796

Port of New York

[Judgment for defendant.]

(Decided June 24, 1976)

Barnes, Richardson & Colburn (*Joseph Schwartz* and *James Caffentzis* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*David A. Ast* and *Joseph R. Borich*, trial attorneys), for the defendant.

MALETZ, Judge: This case involves the proper classification of articles invoiced as "papier-mache figurines" that were imported from Japan via the port of New York in 1970. The articles were classified by the government as dolls under the provisions of item 737.20 of the Tariff Schedules of the United States (TSUS), as modified by T.D. 68-9, and assessed duty at the rate of 24 percent ad valorem. Plaintiff claims the merchandise is classifiable under item 256.75, TSUS, as modified by T.D. 68-9, as articles of papier-mache, not specially provided for, dutiable at the rate of 5½ percent ad valorem.[1]

[1] The parties agree that the articles are in chief value of papier-mache.

The government alternatively claims that if the court should find the importations are not dolls, they would then be classifiable under item 737.40, TSUS, as modified by T.D. 68–9, as other toy figures of animate objects (except dolls) not having a spring mechanism and not stuffed, dutiable at the rate of 24 percent ad valorem.

The pertinent provisions of the tariff schedules are as follows:

Schedule 7, Part 5, Subpart E.—Models; Dolls, Toys, Tricks, Party Favors

Subpart E headnotes:

1. The articles described in the provisions of this subpart (except parts) shall be classified in such provisions, whether or not such articles are more specifically provided for elsewhere in the tariff schedules, . . .

* * * * * * *

2. For the purposes of the tariff schedules, a "toy" is any article chiefly used for the amusement of children or adults.

Classified under:

737.20	Dolls, and parts of dolls including doll clothing	24% ad val.

Defendant's alternative claim:

	Toy figures of animate objects (except dolls):	
	Not having a spring mechanism:	
*	* * * * * * *	
	Not stuffed:	
*	* * * * * * *	
737.40	Other	24% ad val.

Plaintiff's claim:

Schedule 2, Part 4, Subpart D.—Articles Not Specially Provided for of Pulp, of Papier-Mache, of Paper, or of Paperboard

Subpart D headnote:

1. This subpart covers articles of pulp, of papier-mache, of paper, or of paperboard, not provided for elsewhere in this schedule or in schedule 7.

	Articles, of pulp, of papier-mache, of paper, of paperboard, or of any combination thereof, not specially provided for:	
*	* * * * * *	
256.75	Of papier-mache	5.5% ad val.

The importations, as described in plaintiff's catalogue, consist of five papier-mache miniature figures of "[l]ovely little lassies, brilliantly hand colored and coyly posed." See plaintiff's exhibit 4, back page. Three samples of the imported articles are in evidence as illustrative exhibits (plaintiff's exhibits 1–3); while these samples are of plastic rather than papier-mache, in every other respect they are the same as the actual importations. There are no samples of the two remaining imported figures but they are accurately depicted in plaintiff's catalogue.

Each of the imported figures is 4-½ inches tall and is proportioned and posed in a cute and amusing fashion with brightly colored bushy hair made of soft fur. More particularly, the figure represented by Style 302 (plaintiff's exhibit 1) has soft purple hair, almond shaped eyes and protruding ears; it is posed in a pigeon-toed posture, has an extended belly and is holding a large lollipop upon which is inscribed "happy birthday." Style 303 (plaintiff's exhibit 3) has bright orange hair, is also pigeon-toed and is stooped over in a cute pose while coyly winking; the inscription taped onto this figure reads "guess who I like?" Style 304 (plaintiff's exhibit 2) has large protruding ears and a wide grin; the figure is carrying a flower and a taped inscription reading "I LOVE YOU." The two other samples depicted on the last page of plaintiff's catalogue are both coyly posed pigeon-toed figures having yellow or purple hair. Style 305 has a kerchief which is held like a sack and contains an inscription reading "Get Well Soon." Model 306 has clasped hands and is inscribed "I WUV YOU."

Against this background, plaintiff contends that the imported figurines do not come within the common meaning of the term doll because (1) they are not used as playthings by children; (2) they are not recognized and sold in the trade as dolls; and (3) they are marketed and sold as novelty items and are used as an effective substitute for greeting cards.

Defendant contends that the importations are classifiable as dolls under item 737.20 because (1) item 737.20 is an *eo nomine* provision which includes all forms of the article; (2) the legislative history demonstrates that Congress intended to include the items before the court under the doll provisions; (3) this conclusion is underscored by an examination of the samples; and (4) the record shows the importations are known as dolls in the trade.

Inasmuch as the imported articles were classified by the government as dolls, plaintiff's first burden was to overcome the presumption of correctness attendant upon this classification and establish that the importations were not dolls. In an effort to meet this burden, plaintiff presented the testimony of two witnesses, both of whom were employed by it, one as sales manager and the other as national account

executive. They indicated that the importations are impulse novelty gifts which are displayed attractively and in sufficient quantity at retail stores to induce customers to buy the item on impulse, even though they had no intention of purchasing such an item when they entered the store.

Each of the items is imported in a cardboard box which is suitable for mailing. On the box is a space for the name and address of the addressee; a space under the caption "greetings from" for the name and the address of the addressor; and a space for postage. Printed on another side of the box is: the style number of the enclosed figurine; an inscription that is the same as that contained on the figurine, e.g., "guess who I like?"; and the name and address of the plaintiff-importer, Berrie. The purpose of the box is to enable the purchaser to mail the item as a greeting or message in place of a greeting card. The imported figurines themselves were distinguished by plaintiff's witnesses from greeting cards on the basis that they (i) are not made of cardboard or paper; (ii) have a more lasting and enduring quality than ordinary greeting cards which are disposed of after a short period of time; and (iii) are more expensive than the ordinary greeting card.[2] The importations were merchandised through retail card and gift shops and were sold to drugstores, variety stores, department stores, tie shops and men's haberdashers.

The items are most frequently utilized on knickkack shelves, credenzas, bookshelves, and displayed on desks, counters and shelves in offices and restaurants. According to plaintiff's witnesses, the articles are purchased as gifts or greeting messages and the recipient of these figures displays them in a place where they can be seen and read. Beyond that, a witness for plaintiff testified that if the taped message were removed from the figure, it would be generally considered a doll. This witness further indicated that a doll is manufactured for the express purpose of being presented to a child between the ages of 8 months and 5 years and should represent a real person or real object with which the child is familiar. The witness was familiar with the figure of a Hawaiian hula girl that is placed on the front dash or rear seat deck of an automobile as a decorative item and did not consider that article to be a doll.[3] He did concede, however, that a retailer could sell the present importations as dolls.

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[2] Legal distinctions between this type of article and greeting cards appear in *S. Y. Rhee Importers* v. *United States*, 61 CCPA 2, C.A.D. 1108, 486 F.2d 1385 (1973) where various inflatable items with humorous sayings or greetings were held to be toys under item 737.90. In rejecting a claim for classification of this merchandise as greeting cards, the court found that the chief use of the item was amusement and further ". . . that such use was the very reason why the articles were purchased instead of ordinary greeting cards and that the 'greeting' use was merely incidental to the chief use of amusement. . . ." 61 CCPA at 5.

[3] In *American Customs Brokerage Co., Palmar Import Co., Inc.* v. *United States*, 60 Cust. Ct. 23, C.D. 3246, 278 F. Supp. 316 (1968), the court found such figures of Hawaiian hula girls classifiable as dolls under paragraph 1513 of the Tariff Act of 1930.

The other witness for plaintiff considered that dolls were articles used by children as playthings but recognized that articles used for ornament or display could also be dolls and gave as an example the expensive dolls from various countries that are collected for display on shelves.

One of defendant's two witnesses—an officer in a company manufacturing products competitive with those of plaintiff—testified that he has seen dolls composed of papier-mache; that he has seen dolls with humorous sayings or greetings on them; and that, in his opinion, the importations in question are dolls and were so referred to in the trade. This witness defined a doll as "a representation or a reproduction of a model person or human form . . . in smaller scale." Products called "whatchamacallits" which are figures in caricature, made of a stonelike material posed in comic dress and manner on pedestals containing humorous sayings are dolls according to this witness; however, his company's advertisement in the *New York Gift Show* book (1975), p. 437 (plaintiff's exhibit 9) referred to these items as "whatchamacallit *statutes*." [Emphasis added.] This witness then testified that a statue of George Washington, without the pedestal, horse and other distractions, could be considered a doll in the very broad sense that it fits his definition of a representation of a human being in three dimensional form.

Defendant's second witness, who was at one time a senior toy buyer for Sears Roebuck, defined dolls as miniatures or likenesses of human beings, including babies and animals; in his view, dolls do not have to be a plaything used by children. (For example, collector dolls are "dolls" though they have no play value.) He added that it is usual, however, for dolls to contain an amusement factor. According to the witness, the present importations have amusement value to a child; they could be playthings and also could be room decorations.

In the setting of this record, the first matter for determination is whether the importations are within the common meaning of the term doll. As to this, plaintiff insists that in order to determine whether the imported articles are dolls or figurines the court must weigh the evidence concerning the manner in which the articles are actually used.[4] Defendant contends, to the contrary, that the provision for dolls, item 737.20, is an *eo nomine* provision, and since an *eo nomine*

[4] For this proposition, plaintiff cites *Parksmith Corporation* v. *United States*, 71 Cust. Ct. 12, C.D. 4463, 365 F. Supp. 461 (1973), *aff'd* 62 CCPA 76, C.A.D. 1149, 514 F. 2d 1052 (1975). That case, it is to be noted, involved souvenir replicas of the Empire State Building, Statute of Liberty, etc., which were classified by Customs under item 653.80 as silver plated "articles not specially provided for of a type used for household, table or kitchen use"—and which were held by the court to be properly classifiable under item 657.75 as articles of lead. In reaching this conclusion, the court in *Parksmith* found that the importations in question lacked any utilitarian nature and were primarily decorative objects. The crucial consideration is that in *Parksmith* the court was dealing with a tariff provision, item 653.80, under which, by its specific terms, the use of the article was of paramount importance.

provision covers all forms of the article (*New York Merchandise Co., Inc.* v. *United States*, 62 Cust. Ct. 283, C.D. 3746, 305 F. Supp. 25 (1969), *aff'd* 58 CCPA 53, C.A.D. 1004, 435 F. 2d 1315 (1970); *Weyerhaeuser Company* v. *United States*, 71 Cust. Ct. 81, 83, C.D. 4479 (1973); *Nootka Packing Co., et al.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935)), the articles before the court, if they be dolls, are properly classifiable thereunder.

It is well established in customs jurisprudence that the tariff provision for dolls is not a use provision but an *eo nomine* provision. *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 CCPA 67, 73–4, C.A.D. 639 (1957); *Louis Wolf & Co., Inc.* v. *United States*, 15 Cust. Ct. 156, 161, C.D. 963 (1945); *The American Import Company* v. *United States*, 22 Cust. Ct. 51, 53, C.D. 1158 (1949); *Barum Co., Inc.* v. *United States*, 30 Cust. Ct. 414, 417, Abs. 57251 (1953).

Equally well established is the concept that a doll for tariff purposes is not confined to playthings for children but includes a wide range of other articles including but not limited to dolls for ornamentation such as boudoir dolls, souvenir or prize dolls, dolls for display or advertising purposes, and dolls sold as gag items, bar gadgets, adult novelties, etc. *Louis Wolf & Co., Inc.* v. *United States*, *supra*, 15 Cust. Ct. at 157, 158; *Gold-Silver & Co.* v. *United States*, 35 Cust. Ct. 246, 247, Abs. 59301 (1955). Thus the following wide range of articles have been held to be dolls for customs purposes: "World Fair Dolls" made of celluloid and manufactured to "simulate a military uniform with the World's Fair insignia of the 'Perisphere' and 'Trylon' on the hat," *Louis Wolf & Co., Inc.* v. *United States*, 15 Cust. Ct. 156, C.D. 963 (1945); Small woven rush figures made in Mexico, consisting of a horse and rider and a figure of a woman made of straw, *The American Import Company* v. *United States*, 22 Cust. Ct. 51, C.D. 1158 (1949); A hollow celluloid figure characterized as a gag item for adults which squirts water in a manner simulating the "Manneken Pis" statue in Brussels, Belgium, *Gold-Silver & Co.* v. *United States*, *supra*, 35 Cust. Ct. 246; A miniature plastic figure with a metal shaft affixed thereto which dedicated the article to exclusive use as a dancing doll with a music box, *United States* v. *Cody Manufacturing Co., Inc., et al.*, 44 CCPA 67, C.A.D. 639 (1957); A celluloid baby with movable hands on a chenille stem either with or without a milk bottle and diaper, mostly used by florists in making up table decorations, *M. Adler's Son, Inc., et al.* v. *United States*, 38 Cust. Ct. 466, Abs. 60634 (1957); A mechanical dressed crawling baby which moved along a flat surface in a crawling posture when wound by a key, *Brechner Bros.* v. *United States*, 58 Cust. Ct. 272, C.D. 2959 (1967); *Lewis Galoob Co. et al.* v. *United States*, 67 Cust. Ct. 421, C.D. 4308 (1971); A papier-mache Hawaiian hula girl, 5" in

height, mounted by a spring on a magnetic holding base used on the front dash or rear seat deck of a car as a decorative item and swaying with the motion of the auto in a hula dance fashion, *American Customs Brokerage Co. et al.* v. *United States*, *supra*, 60 Cust. Ct. 23.

Plaintiff, on the other hand, relies on several other cases where miniature representations of persons were held not to be dolls. One of these cases is *M. Pressner & Co.* v. *United States*, 24 Cust. Ct. 77, C.D. 1211 (1950) where the court found that merchandise consisting of celluloid figures representing football players which could be pinned on the clothing of the purchaser, were not dolls in that they were worn as badges or insignias and not as ornaments and, therefore, did not come within the common meaning of the term doll. See also *M. Pressner & Co.* v. *United States*, 7 Cust. Ct. 106, C.D. 546 (1941). Manifestly, in the case before us, the articles in question are not worn on clothing.

Another case relied on by plaintiff is *Louis Marx & Co., Inc.* v. *United States*, 65 Cust. Ct. 672, C.D. 4156 (1970) which involved hand-painted reproductions of the presidents of the United States mounted on platforms. These articles had been classified by the government as toy figures of animate objects and were held by the court to be dutiable under the provision for figurines of plastic. What is particularly significant is that the provision for dolls was not involved in that case; the sole issue rather was whether the articles were or were not "toys" as that term was defined in the tariff schedules.

Plaintiff further cites *Barum Co., Inc.* v. *United States*, 30 Cust. Ct. 414, Abs. 57251 (1953) to support its contention that the use or manner in which a figurine is used is an essential element in deciding whether that figurine is a doll. *Barum*, however, is also distinguishable from the case before us. In *Barum* the merchandise consisted of a hollow soft rubber figure of a monkey and of an elephant with simulated clothing painted on the body of each and a squeeze whistle firmly attached to the back. The articles were conceded by the parties to be toys and the sole remaining question was whether they were the kind of toys which fell under the doll provisions of the Tariff Act of 1930. The court found that the articles were not dolls because they were not in human form and because the metal whistle—which was an outstanding characteristic—rendered it a toy rather than a doll. Since the imports in our case are in human rather than animal form and do not possess whistles, *Barum* is clearly not in point.

As we have seen, the common meaning of the word "doll" encompasses a great variety of merchandise. Perhaps because the variety is so vast, the courts have not been able to render a comprehensive definition of the term "doll," nor have they been able to ". . . make

any all-embracing finding as to what is a doll or to hold that all small figures are dolls . . . ."[5] Nonetheless, there does appear to be a certain amount of agreement among the lexicographical authorities. To illustrate, we start with the following lexicographic authorities to which reference was made in *Louis Wolf & Co., Inc.* v. *United States*, *supra*, 15 Cust. Ct. at 160:

> . . . [W]e are of opinion that the common meaning of that term [doll] is sufficiently comprehensive to include all dolls, whether or not they are toys. In support of this view, it will be noted that the secondary definition of "doll" as given in Webster's New International Dictionary, 2d Edition, 1936, reads:
>
> * * * any similar figure for play or *ornament* [Italics supplied].
>
> This broader view is further borne out by a comprehensive article on the subject of dolls appearing in the Encyclopaedia Britannica, 14th Edition, wherein the history, development and use of various types of dolls are set forth in detail, indicating besides their use as playthings for children, wide use in religious rites and other ceremonies in many parts of the world from earliest times to the present day.

More recent lexicographical authorities agree that the word "doll" encompasses a broad spectrum of articles which are commonly known as dolls. Thus in *Webster's New International Dictionary* (2d ed., 1953) p. 767, a doll is described as;

> doll * * * 2. A child's puppet; esp., a toy baby for a child; any similar figure for play or ornament. * * *

In Vol. 9 *Encyclopedia Americana* (Internat. ed., 1973) p. 255, a doll is described as:

> Doll, a figurine of a human being. The word was first used for the child's toy about 1700, possibly as a contraction of Greek eidolon ("idol"), but more probably from the girl's name "Doll" which was short for "Dorothy." Some authorities now use the word only to refer to the child's toy. Other classes of dolls include religious figurines, objects of art and *souvenirs*. [Emphasis added.]

In Vol. 8 *Collier's Encyclopedia* (1973 ed.) p. 313, a doll is described as:

> Doll, a plaything usually in the form of a baby or child, widely cherished by small girls; also, the ornamental figurines collected by adults as objects of art, curios, *keepsakes*, of *souvenirs*. [Emphasis added]

Viewing the samples before us, it appears obvious that they meet the definition of a doll cited above. Furthermore, the testimony makes

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[5] *Louis Wolf & Co., Inc.* v. *United States*, *supra*, 15 Cust. Ct. at 161.

it clear that the articles are souvenirs or keepsakes which are defined as follows:

Webster's New World Dictionary of the American Language (College ed., 1962):

souvenir–n. something kept or serving as a reminder of a place, an occasion or a person; keepsake; memento.
keepsake–n. something kept, or to be kept, for the sake of, or in memory of, the giver; memento.

Webster's New International Dictionary (2d ed, 1948):

souvenir–n. . . . That which serves as a reminder; a remembrancer; memento; keepsake.
A memory; recollection.
keepsake–n. . . . Anything kept or given to be kept, for the sake of the giver; a token of friendship.

Applying these definitions to the merchandise before us, we are reinforced in our view that the importations are within the common meaning to the term doll. As we have seen, these articles are sent as a greeting or a reminder of an occasion (e.g., "Happy Birthday," "Get Well Soon") or of a person (e.g., "Guess Who I Like," "I Love You," "I Wuv You"); thus, they meet the definition of souvenirs or keepsakes which as we have observed are within the ambit of those articles commonly known as dolls.

Finally, we come to plaintiff's argument that the importations cannot be considered dolls because they are not merchandised as such. While the manner in which an article is merchandised is one of the factors to be considered in determining its classification, it is not determinative. E.g., *S. Y. Rhee Importers* v. *United States*, *supra*, 61 CCPA at 4; *United States* v. *Ignaz Strauss & Co., Inc.*, 37 CCPA 32, C.A.D. 415 (1949); *Novelty Import Co., Inc.* v. *United States*, 53 Cust. Ct. 274, Abs. 68780 (1964).

For the foregoing reasons, we hold that the articles in issue were properly classified as dolls under item 737.20. Plaintiff's claim is overruled and judgment will be entered accordingly.

(C.D. 4660)

ROSEN ENTERPRISES, INC. *v.* UNITED STATES

Cigarette lighters

EXPORT VALUE—SUCH MERCHANDISE—PRESUMPTION OF CORRECTNESS

Disposable cigarette lighters designated HD–600 manufactured in and exported from Japan between February and April, 1971, and appraised upon entry at Los Angeles-Long Beach, Calif. on the basis of export value as defined in 19 USCA § 1401a(b) at $3.38

per dozen, net packed, on the basis of disposable cigarette lighters designated GL–160 manufactured in and exported from Japan to the United States in December, 1970, by the same manufacturer and found by the appraising official to be the same as the imported lighters, *Held*, to be properly appraised in the absence of evidence that the GL–160 lighter is dissimilar to the imported lighter, and the importer having failed to establish that the appraisement was void by reason of lack of designation and examination of merchandise which had been examined and released under immediate delivery permit procedures.

Court No. 72–11–02257

Port of Los Angeles

[Dismissed.]

(Decided June 24, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Andrew P. Vance* and *Jerry P. Wiskin*, trial attorneys), for the defendant.

RICHARDSON, Judge: The merchandise in this case consists of cigarette lighters described on the invoices as article number HD–600, cigarette gas lighter, with additional words of description. The merchandise was exported from Japan on February 11, March 24, and April 30, 1971, entered at the port of Los Angeles–Long Beach, California, and appraised on the basis of export value as defined in 19 U.S.C.A., section 1401a(b) (section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) at $3.38 per dozen, net packed.

The parties agree that export value as defined in section 1401a(b) is the proper basis for appraisement of the lighters. Plaintiff contends, by way of amendment of its complaint that the correct appraised export value of the lighters is $2.366 per dozen, net packed.

Benjamin Bloomfield, plaintiff's buyer and sales manager, testified that he orally placed an order for 500,000 HD–600 disposable cigarette lighters with the manufacturer, K. K. Hirota, Tokyo, Japan, at the end of November, 1970, at the price of 16 cents each, plus 2, 3 or 4 mills, that the asking price was 19 cents each but it was usual for his company to get 10 to 15 percent discount due to the large quantities purchased. The witness stated that he knew Sonosuke Aoyagi, the affiant in exhibit 1, and knew that he spoke and read English very well.

The affidavit of Sonosuke Aoyagi, dated June 16, 1975, received in evidence as exhibit 1, states:

> That I am the Vice President of Hirota Company and have been with this company for eighteen years, being responsible for supervising the sales and financing of the company.

That I therefore have personal knowledge of the selling practice and pricing of the merchandise sold by our company for exportation to the United States. This includes the sales practice of cigarette lighters (disposable) invisible plastic tank, such as article number HD–600, which are sold to Rosen Enterprises, Inc.

That normally merchandise sold by us is delivered to the buying agent of the American or U.S. customer in Japan at our factory. The place and physical location of this is #19, 3-chome Asakusabashi, Daito-ku, Tokyo. We have never made any sales for delivery along side the dock of F.O.B. Japanese port, however, we have made delivery to the ex-buying agent's warehouse. In such instances we charge for the cost of making this delivery.

That we do not have any special discount percentage rates for quantity purchases of our disposable lighters. However our price of disposable lighters vary depending upon the purchaser or the past history of the quantity that the purchaser has purchased.

That for the period between February and June of 1971 I have set forth below a list of the date of sales, the quantity purchase and the unit price of all of the sales made during that period of disposable lighters, taken from our record books.

Date of sale	Quantity Purchase	Unit Price
2–11–71	24,000 pieces	16.25 cents
2–15–71	24,000 pieces	19.8 cents
3–20–71	60,000 pieces	18 cents
3–22–71	50,000 pieces	16.4 cents
3–23–71	50,000 pieces	16.4 cents
4–20–71	36,000 pieces	18 cents
4–28–71	125,000 pieces	16.3 cents
5–15–71	80,000 pieces	18 cents

/s/ S Aoyagi

Bud Nakamura, import specialist in the employ of the U.S. Customs Service at the port of entry, testified that he processed the involved entries and made the advisory appraisement in this case at $3.38 per dozen, net packed, upon the basis of written advice received from the national import specialist in New York through the Customs Information Exchange to the effect that the HD–600 lighter was the same merchandise as the GL–160 lighter made by the Hirota Company and exported to the United States on or about December 15, 1970—a conclusion reached by the national import specialist after examining samples of both lighters and checking with an importer in New York.

The official papers received in evidence at the trial bear the initials of the customs inspectors who examined and released the shipments in issue as well as the dates of their inspections. These notations appear on each special customs invoice and packing list attached to the entry papers.

Plaintiff contends that there is no presumption of correctness attaching to the appraisements in issue because there was no actual examination and inspection of the merchandise in issue, citing the first three sentences of 19 U.S.C.A., section 1499 and 19 C.F.R. 14.1(b). Plaintiff further contends that the testimony of the witness Bloomfield and the affidavit set forth as exhibit 1 constitute *prima facie* evidence supporting the claimed export value in the absence of any presumption of correctness supporting the appraised value.

Defendant contends that the merchandise was examined prior to its release from customs custody in compliance with 19 U.S.C.A., section 1448(b) and applicable regulations, and, among other things, that plaintiff has failed to overcome the statutory presumption of correctness attaching to the appraisements in issue. Defendant argues (brief, p. 9):

> Plaintiff had every opportunity at trial to adduce testimony or introduce documentary evidence that the HD–600 lighters and the GL–160 lighters were, in fact, not "such" merchandise. Yet, plaintiff failed to adduce one single shred of evidence to controvert Mr. Nakamura's testimony. . . .

On the instant record the court agrees with the defendant in this case. The presumption of correctness attaching to the appraisements at bar has not been rebutted. First, the appraisements are not void. Undoubtedly, plaintiff's challenge to the legality of the appraisements stems from the absence of the designation of examination packages by the district director which customarily appears on the Summary Sheet. However, such omission in this case is explained by the legend "RELEASED ON IMMEDIATE DELIVERY PERMIT" that appears on each Summary Sheet followed by the permit number and the date of release. These notations set into motion a different practice in this case. See 19 U.S.C.A., section 1448(b); 19 C.F.R. 8.22(a), 8.59 (1971 edition); and section 8.59(b), Customs Manual (1954 edition, as amended).

Section 1448(b) and the implementing regulations require designation of the minimum requisite examination packages to be made on the delivery permits themselves, and do not require notation of this fact on the Summary Sheets. And, information as to the identity of the packages designated for examination, is to be known only to the customs inspectors involved prior to arrival of the merchandise within the port. See 19 C.F.R. 8.59(c) (1971 edition). Thus, in view of the evidence of record that the instant merchandise was examined and released by customs inspectors under special permits for immediate delivery, the court must assume that the appropriate designation and examination of the merchandise for appraisement purposes was made

in compliance with law, no evidence to the contrary having been introduced by the plaintiff.

Secondly, even if full credence be given to the statements contained in exhibit 1, what the case comes down to, as plaintiff's counsel aptly noted at the trial, is whether the HD–600 lighter is the same as the GL–160 lighter (R.147). And, on this phase of the case the evidence adduced by plaintiff does not address itself to this issue at all. Hence, it follows, therefore, that in the absence of evidence of dissimilarity between the imported lighters and those relied upon in the making of the appraisements herein, plaintiff has failed to prove that the value adopted by the appraising official in this case was not the proper export value. *United States* v. *A. Orlikoff of Mexican Artcraft Co. et al.*, 25 Cust. Ct. 441, Reap. Dec. 7892 (1950). As such, plaintiff has failed to sustain the issuable allegations of the complaint, and the action must, therefore, be dismissed.

Accordingly, on the record the court finds as facts:

1. That the merchandise in this action consists of disposable cigarette lighters designated as model HD–600 manufactured in and exported from Japan between February 11 and April 30, 1971.

2. That said merchandise was appraised upon entry at the port of Los Angeles-Long Beach, California, on the basis of export value as defined in 19 U.S.C.A., section 1401a(b) (section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) at $3.38 per dozen pieces, net packed, on the basis of a disposable cigarette lighter designated model GL–160 manufactured in and exported from Japan to the United States by Hirota Company, the manufacturer of the imported lighters and found by the appraising official to be the same as the imported lighters.

3. That there is no evidence in the record that the said disposable cigarette lighter designated model GL–160 is dissimilar to the imported cigarette lighter.

Upon these facts the court concludes as matters of law;

1. That export value as defined in 19 U.S.C.A., section 1401a(b) (section 402(b), Tariff Act of 1930, as amended by the Customs Simplification Act of 1956) is the proper basis for determination of the value of the merchandise herein.

2. That plaintiff has not established an export value different from that returned in the appraisement of said merchandise.

3. That the appraised value of said merchandise remains in full force and effect by reason of plaintiff's failure to overcome the presumption of correctness attaching to the appraisements herein.

Judgment will be entered accordingly.

(C.D. 4661)

E. BESLER & COMPANY, A/C
SICKLES, INC., ET AL. *v.* UNITED STATES

Photographic equipment

OPTICAL PRINTERS AND PARTS—ELECTRICAL ARTICLES—PHOTOFINISHING EQUIPMENT

Merchandise described as Internegative Printers and various parts imported at Nogales, Arizona, and Chicago, Illinois, in 1968 and 1971, respectively, from West Germany and classified in liquidation under TSUS item 722.18 as enlargers and camera-enlargers as to the printers and under TSUS item 722.34 as parts of enlargers and camera-enlargers as to the various parts, *Held*, classifiable, as to the printers, under TSUS item 722.94 as equipment specially designed for photofinishing still pictures where the evidence establishes sales to and usage principally by professional photofinishers in the duplication and printing of slides and the making of internegatives from transparencies, and there is no evidence of reference to and usage of the printers as cameras or enlargers, and classifiable, as to the parts, under TSUS item 688.40 as electrical articles and electrical parts of articles, n.s.p.f., there being no dispute between the parties as to the electrical nature of the parts.

Court No. 72-1-00043 and
Protest No. 70/64262

Ports of Chicago and Nogales

[Judgment for plaintiffs.]

(Decided June 25, 1976)

Stein and Shostak (*James F. O'Hara* of counsel) for the plaintiffs.

Rex E. Lee, Assistant Attorney General (*Joseph I. Liebman* and *David R. Ostheimer*, trial attorneys), for the defendant.

RICHARDSON, Judge: The merchandise the subject of these joint actions, described as Homrich-Internegative Printers and various parts thereof, was imported from West Germany and entered at the ports of Nogales, Arizona, in 1968 and Chicago, Illinois, in 1971. The printers were classified under TSUS item 722.18, as modified by T.D. 68-9, as other enlargers and camera-enlargers at the rate of 13% or 9% *ad valorem* depending upon date of entry. The parts were classified under TSUS item 722.34, as modified by T.D. 68-9, as other

parts of any of the foregoing enlargers and camera-enlargers at the rate of 18% or 12% *ad valorem* depending upon date of entry.

It is claimed by plaintiffs that the merchandise should be classified under TSUS item 722.94, as modified by T.D. 68–9, as other equipment specially designed for photofinishing (still pictures), not specially provided for, at the rate of 9% or 6% *ad valorem*, depending upon date of entry, or, alternatively, under TSUS item 688.40, as modified by T.D. 68–9, as electrical articles and electrical parts of articles, not specially provided for, at the rate of 10% or 6.5% *ad valorem*, depending upon date of entry. Defendant claims that the merchandise should be alternatively classified under TSUS item 722.16, as modified by T.D. 68–9, as other cameras other than fixed focus valued over $10 each at the duty rate of 13% or 9% *ad valorem*, depending upon date of entry.

Leslie G. Ebeling, vice president and general manager of Sickles, Inc., the ultimate consignee and producer and distributor, among other things, of products relating to the duplication of slides and film strips, testified that he is familiar with the imported printers and knows what they are used for, has seen them in use, and that his company sells, assembles, manufactures and services them. He stated that the primary use of the imported printers (3 models, IP 35, junior and intermediate, which vary only in the amount and degree of convenience features) was to make duplicate slides or transparencies from master slides or transparencies onto an unexposed film loaded into the camera head. And the exposed film is then removed from the camera head and processed with chemical baths to develop the latent image. The developed film is either cut and mounted into slides, if it is to be a slide, or allowed to remain in strip form if it is to be a film strip.

The witness explained the manner in which the printers function. The unexposed film is transported from the supply reel to a position above the lens and exposed in that position. A light source located in the base of the printer produces illumination. The light shines through a transparent medium known as a slide or transparency. The light is collected by the lens and is then imaged on the exposed film positioned above the lens. No movement of the film takes place during exposure. There are timing devices and electronic devices in the printer which provide the sequencing and timing of the shutter and movements of the film to produce the proper imaging. In normal usage the size of the transparency and the size of the image on the film are the same (the printers can produce a duplicate smaller than the master 4 x 5 down to 35 mm. or larger than the master but limited by the size of the unexposed film).

The witness also testified that the printers are used to make internegatives, that is, to produce negatives from transparencies.

These are the principal uses of the printer according to the witness who testified that they are sold mainly by Sickles, Inc. to professional photofinishers who are desirous of producing duplicate slides, film strips and internegatives.

With respect to electrical aspects of the printer, Mr. Ebeling testified that the camera heads can only be used with other electronic devices incorporated in them. The printers must have an electrical source of power. The light source is an electric light bulb. The film transporting mechanism is electric motor driven. The pressure plate holding the film in a flat position during photographic exposure is electrically operated and uses a solenoid. The film advance motor which moves the film into the exposed side of the take-up is an electric motor. The timer which controls the length of time of exposure of the film to light is electronic. The opening and closing of the photographic mirror shutter is controlled by an electronic solenoid.

The witness also testified at some length to other functions of the printers which may be summarized by reference to functions appearing in sales literature received in evidence as exhibit B1. These other features are: PRINT SLIDES . . . from negatives . . . color or black and white, CROP . . . portion of a transparency as a new slide . . . straighten slides, COLOR CORRECT . . . twist a dial to add or change color . . . make tinted slides from black and white, CREATES SPECIAL EFFECTS . . . montage, mask, screen, color mood, dodge, burn-in, etc.

And on the subject of color additional literature received in evidence during the testimony of the witness Ebeling in the form of an instruction manual (exhibit B2, page 10) states:

> DIALABLE COLOR FILTER LIGHT SOURCE – the color head represents a unique, continuous filtering device. It has been developed in close consultation with numerous large photofinishing establishments. . . .

And the witness concluded his testimony by stating as follows (R. 78–79):

> Q. Mr. Ebeling, the merchandise which is in issue in this case and depicted on Plaintiff's Exhibits 1, 2 and 3, in your opinion, are those devices enlargers?—A. No, sir.
> Q. Are they cameras?—A. No, sir.

David Kleiman, owner and president of Kaufman and Favry Co., commercial photographers owning subsidiary companies doing professional and amateur finishing services and art work for slide work presentation through a lettering company, testified that his company owns a model IP 35 Homrich printer and owns approximately 18 enlargers of various types, that the printer is used for duplicating which he explained was high mass production of slides of the same

size—one to one. The witness stated that in his opinion the printer depicted in exhibit 1 is not an enlarger, is not a camera, but is a duplicator which is used in photofinishing.

Kendrick O. Richardson, former director of sales development of photofinishing for Eastman Kodak Company, now a columnist for Photo Marketing Magazine, and a consultant for a photofinishing association, testified that he has used an Emby-Homrich printer, has seen them used and is familiar with them. He stated that in his opinion they are for the purpose of duplicating slides, and that he calls them photofinishing equipment for making duplicate slides or for making internegatives. He said they are not cameras, camera-enlargers or enlargers, and that during the years he serviced the photofinishing industry he observed photofinishers having printers such as the imported printers on their premises, observed how they were used, and that to his knowledge they were never regarded as enlargers by the photofinishing trade he solicited.

John R. Grimes, instructor in photography and assistant in all fields of the photographic arts and photography to the director of the Institute of Design at the Illinois Institute of Technology, testified that he has seen the printer depicted in exhibit 1 in operation on one occasion, has manipulated the controls on such a printer so that it performed a cropping operation, a color correction operation, and a special effects operation. The witness testified about a number of machines that performed an enlargement operation, and a reduction operation mentioning by name Honeywell Repronon, and the Bogens Illumitran. He stated that he was familiar with equipment especially designed to print still pictures by reason of having used such equipment and having taught its use, and that some of the items in this category are enlargers, enlarging easels, developing tanks, reels, film hangers, squeegies, driers, and mount presses. And he was of the opinion that the article depicted in exhibit 1 is a motorized copy camera possessing a color head for color filtration.

Plaintiffs contend that the printers are more than cameras, enlargers, or camera-enlargers, and that they were designed for and used as photofinishing equipment. Plaintiffs argue (brief, p. 27):

> The article before the Court in this case has as its principal function the duplication of slides and film strips in generally the same dimension, or a reduced dimension, as the original which is duplicated. It can, under certain circumstances and with *modifications*, be made to perform other functions some of which can to a greater or lesser degree be performed also by cameras or enlargers. It is quite clear from the Record that these other secondary and minimal functions are subsidiary to the main purpose of utilizing this equipment which is to duplicate slides and film strips. . . .

Defendant contends that the imported articles are camera-enlargers, and that they are not utilized in the processing and developing of the film, and as such are not photofinishing equipment. Defendant argues (brief, p. 17):

> Defendant submits that the record is clear that the imported devices possess the combined characteristics and capabilities of a camera and enlarger and were therefore properly classified under the tariff provision for combination camera-enlargers. . . .

And defendant also argues (brief, p. 20):

> Plaintiffs' claim that the devices should have been classified under item 722.94, *supra*, as photofinishing equipment is without any foundation. The record does not support such classification, it totally contradicts it. . . .

Plaintiffs also contend that the printer parts and, alternatively, the printers themselves, should be classified under TSUS item 688.40 as electrical articles and electrical parts of articles not specially provided for. Plaintiffs argue (brief p. 28):

> There is ample evidence in this Record, uncontroverted by any evidence offered by defendant, that the Homrich devices in issue operate by and are dependent upon an electrical source of power both to drive the mechanism within the device as well as to provide the artificial light source which is essential to the function of the device. . . .

Defendant contends that the provision for camera-enlargers is a specific provision which takes precedence over the parts provision.

And finally, defendant contends that if the court determines that the imported merchandise was improperly classified under item 722.18, they should be classified alternatively under item 722.16 as cameras because the legislative and judicial history are indicative of a broad and all-inclusive application of the provisions for cameras. Plaintiffs contend that there is no evidence in support of defendant's alternative claim for classification of the devices as cameras.

On the record in this case there is no evidence that the articles described on the invoices as optical printers, are bought or sold as cameras, enlargers or camera-enlargers. There is no evidence that they are used or referred to as cameras, enlargers or camera-enlargers, or that any of their components are used separately as cameras or enlargers. And in the absence of such evidence, no useful purpose is served, in the court's opinion, by mentally dissecting portions of the imported articles and comparing the components first to a camera, and then to an enlarger. Obviously, these articles must be considered for tariff purposes as a whole since that is the way they are imported, identified, and as the record shows, used.

Congress has recognized a distinct identity for photofinishing equipment even though possessing attributes common to equipment utilized in other areas of the photographic industry. Thus, in TSUS item 722.64 Congress provided equally for "photographic filters for cameras, enlargers, or *photofinishing equipment*." (Emphasis added.)

Congress has also recognized that printers are equipment legitimately employed in the photofinishing segment of the photographic arts industry. Thus, in item 722.86 Congress provided specifically for contact printers under the heading "Equipment specially designed for photofinishing (still picture)." Under this heading Congress also contemplated that a substantial part of the photofinishing equipment covered in item 722.94, although not specifically named, would be mechanical or electrical. *Tariff Classification Study*, Schedule 7, page 176. Optical or projection printers are a species of printer which is at the other end of the spectrum from the contact printer. *Photo-Lab-Index*, 20th edition (1961), Carroll, pp. 14–24.06, 14–34.01. And it appears that the only reason the optical printer was not *eo nomine* provided for under this heading as in the case of the contact printer is the likelihood that such a printer could be employed, not as a camera or enlarger, but rather in the printing of motion picture film, for which equipment Congress made other provisions in item 722.96 at the same basic rate as for miscellaneous photofinishing equipment.

However, the uncontroverted evidence in this case is to the effect that the imported articles invoiced as printers are in fact referred to as vertical optical printers, are mainly sold to and used by professional photofinishers following their importation, are used principally to duplicate and print slides and to make internegatives, and that as to one model featuring a color filtration device, were designed in consultation with some large photofinishing establishments. It is settled law that merchandise is to be classified on the basis of its primary design, construction and function. *Trans-Atlantic Company* v. *United States*, 60 CCPA 100, C.A.D. 1088, 471 F.2d 1397 (1973); *United Carr Fastener Corporation* v. *United States* (*Northern Screw Corp., Party in Interest*), 54 CCPA 89, C.A.D. 913 (1967). As applied to the evidence in this case, such law favors classification of the printers in the manner contended for by plaintiffs. The court, therefore, finds that the printers are electrically powered equipment specially designed for photofinishing still pictures, not specially provided for, within the meaning of TSUS item 722.94 and should be classified under that provision.

The foregoing disposes of the claims and counterclaim respecting classification of the printers. As to the parts imported with the printers and in issue here, the record shows that they were assessed under TSUS item 722.34, a provision for other parts of cameras, enlargers and camera-enlargers. The provision in item 722.94 for "equipment"

is not broad enough to be inclusive of the parts imported with the printers, in the court's view. But since there is no dispute between the parties concerning the electrical nature of these parts, the defendant contending in effect only that they are electrical instruments, apparatus, and other electrical articles provided for in Schedule 7 (defendant's brief, page 21), the parts should be classified under TSUS item 688.40 as electrical articles and electrical parts of articles, not specially provided for, as contended for by plaintiffs, and the court so holds.

For the reasons stated, the claims of the plaintiffs are sustained and the counterclaim of the defendant is dismissed. Judgment will be entered herein accordingly.

(C.D. 4662)

HANCOCK GROSS, INC. *v.* UNITED STATES

Metal articles—Hose fittings and strainer bases

HOUSEHOLD ARTICLES—CHIEF USE

The provision in the superior heading to items 653.95 and 654.20 for "[a]rticles * * * of a type used for household * * * use" is governed by chief use. General Interpretative Rule 10(e)(i); *United States* v. *Parksmith Corporation*, 62 CCPA 76, C.A.D. 1149, 514 F.2d 1052 (1975).

HOSE FITTINGS—CHIEF USE IN HOUSEHOLD NOT ESTABLISHED

The record establishes that at the time of importation the involved hose fittings (couplings, menders and clamps) were used in the United States for industrial water and air hoses as well as for household hoses. Plaintiff failed in its burden of proof under items 653.95 and 654.20 to establish that the fittings were chiefly used in the household.

CHIEF USE—JUDICIAL NOTICE

While, of course, it is indisputable that homeowners use garden hoses, this fact does not mean that the court may infer or take judicial notice of the chief use of the classes or kinds of hose fittings involved in this case. Since the record shows that the fittings were used in industrial air and water hoses, as well as by homeowners, and there is controversy between the parties respecting the chief use of the fittings, chief use in the household had to be established by evidence. And on this issue, plaintiff had the burden of proof. *L. Tobert Co., Inc.* v. *United States*, 41 CCPA 161, 164, C.A.D. 544 (1953).

CHIEF USE—TESTIMONY BY SALES AND MARKETING EXECUTIVES

It is now well settled that sales and marketing executives concerned with the promotion and merchandising of a product over a wide geographic area may give testimony concerning the product's

chief use. *F. B. Vandegrift & Co., Inc.* v. *United States*, 56 Cust. Ct. 103, C.D. 2617 (1966); *Inter Maritime Fwdg. Co., Inc.* v. *United States*, 59 Cust. Ct. 412, 419, C.D. 3177 (1967); *Al Nyman & Son, Inc.* v. *United States*, 61 Cust. Ct. 236, C.D. 3585 (1968).

HOSE FITTINGS—PARTS OF HOSES

The record establishes that the hose fittings had no independent usefulness; that they were dedicated solely to use with rubber or plastic hoses; that once installed in a hose, the fittings normally remained attached thereto for the life of the hose and performed a useful function. Therefore, even assuming *arguendo* that the rubber or plastic hoses which utilized the involved hose fittings were chiefly used in the household, the fittings were parts of such rubber or plastic hoses, and not classifiable as parts of household articles of metal under item 653.95 or 654.20.

STRAINER BASES—PARTS OF SANITARY WARES (SINKS)

Strainer bases are properly dutiable under item 653.95 as parts of sanitary wares where the evidence shows: that the bases are dedicated solely to use in sinks; the bases become a permanent part of the sink after installation; they serve an essential function in receiving and directing the flow of the waste water from the fixture into the drainage and waste system to which they are connected; and that a sink would be incomplete and could not operate effectively to discharge water into the drainage system without a device such as a strainer base.

Court No. 71-11-01813

Port of Philadelphia

[Judgment in part for plaintiff.]

(Decided June 25, 1976)

Tompkins & Davidson (***Allerton deC. Tompkins*** of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (***John J. Mahon***, trial attorney), for the defendant.

NEWMAN, Judge: This action contests the customs classification by the district director at the port of Philadelphia of certain merchandise imported from Japan in 1970 and 1971. The items involved comprise various metal fittings for rubber or plastic hoses (plain couplings, clinching couplings, snap-on couplings, menders and adjustable clamps), and the base or holder for a sink strainer (sink strainer bases).

The hose couplings and menders were assessed with duty at the rate of 13 or 11 per centum ad valorem (depending upon the date of entry) under the provision in item 657.80, TSUS, as modified by T.D. 68-9, for articles of zinc not more specifically provided for elsewhere in the tariff schedules. The adjustable hose clamps and sink strainer bases

were assessed with duty at the rate of 13 per centum ad valorem under the provision in item 657.20, TSUS, as modified by T.D. 68–9, for articles of iron or steel not more specifically provided for elsewhere in the tariff schedules.

Plaintiff claims that the hose fittings are properly dutiable at the rate of 11.5 or 10 per centum ad valorem (depending upon the date of entry) under the provision for household articles of metal, and parts thereof, in item 653.95 or 654.20, TSUS, as modified by T.D. 68–9 (depending upon the component material of chief value). Plaintiff further claims that the sink strainer bases are properly dutiable at the rate of 11.5 per centum ad valorem under the provision in item 653.95, TSUS, as modified by T.D. 68–9, for sanitary wares and parts thereof.

STATUTES INVOLVED [1]

Classified under:

Schedule 6, part 3, subpart G:

Subpart G headnote:

1. This subpart covers only articles of metal which are not more specifically provided for elsewhere in the tariff schedules.

* * * * * * *

Articles of iron or steel, not coated or plated with precious metal:

* * * * * * *

Other articles:

* * * * * * *

657.20	Other	13% ad val.

* * * * * * *

657.80	Articles of zinc, not coated or plated with precious metal	13% or 11% ad val.

Claimed under:

Schedule 6, part 3, subpart F:

Part 3 headnotes:

* * * * * * *

2. The provisions in this part which specifically refer to kitchen or table ware, or to table, kitchen, or household utensils and articles, include articles of types which are used outdoors as well as those which are used indoors.

* * * * * * *

[1] The rate depends upon the date of entry under Presidential Proclamation 3822, T.D. 68-9.

	Articles not specially provided for of a type used for household, table, or kitchen use; toilet and sanitary wares; all the foregoing and parts thereof, of metal:	
*	* * * * * * *	
	Articles, wares, and parts, of base metal, not coated or plated with precious metal:	
	Of iron or steel:	
	Not enameled or glazed with vitreous glasses:	
*	* * * * * * *	
653.95	Other	11.5% or 10% ad val.
*	* * * * * * *	
654.20	Other	11.5% or 10% ad val.

ISSUES INVOLVED

The parties stipulated "that the merchandise described as 0424X MxF Snap On Hose Couplings and 0426X M Snap On Hose Couplings, in Entry No. 134705 (Protest No. 1101–1–000518), which was assessed with duty at the rate of 11 per cent as valorem under item 657.80, TSUS, as articles not specially provided for of zinc, not coated or plated with precious metal, is properly dutiable at the rate of 10 per cent ad valorem under item 654.20, TSUS, as other household articles not specially provided for, of base metal, not coated or plated with precious metal" (R.6).

Hence, remaining in dispute for determination is whether the plain couplings, clinching couplings, menders and adjustable clamps are household articles or parts thereof, of metal, and whether the sink strainer bases are sanitary wares or parts thereof, within the superior heading to items 653.95 and 654.20.

I have concluded that: (1) Plaintiff's claims respecting the snap-on hose couplings and sink strainer bases should be sustained; and (2) plaintiff's claims respecting the other merchandise in issue should be dismissed.

THE RECORD

The record comprises the testimony of two witnesses and twenty-one exhibits (including representative samples of the merchandise) for plaintiff; three witnesses and eight exhibits for defendant.

Plaintiff called as its first witness Helen Colleluori, plaintiff's import manager in 1970 and 1971. In her capacity as import manager, Mrs. Colleluori ordered merchandise and inspected it upon arrival, but thereafter "it was turned over to the sales department" (R.15).

Thus, she had no duties relating to the sale or marketing of the merchandise. In addition to her full-time duties as plaintiff's import manager, Mrs. Colleluori "helped" her husband in their hardware store, where she worked evenings "after six o'clock" and on weekends (R.46).

Mrs. Colleluroi testified that in 1970 and 1971 she personally used all of the hose fittings in issue at home to mend her garden hose "so it could be used again without going to the cost of additional hose" (R.41); that in her hardware store she sold the articles to homeowners to repair garden and washing machine hoses; that the hose fittings are "basically a home item", and it was "very unusual for somebody in industry to come to [her] as a hardware woman" (R.43); that she saw all of the hose fittings used in the homes of friends whom she had visited in 1970 and 1971 in the states of California, Washington, Massachusetts, Connecticut, Virginia, Maryland, Ohio, Florida, New Jersey, New York as well as in the District of Columbia; that she saw the hose fittings used by people for washing cars and rinsing sidewalks; that the adjustable clamps are used to hold couplings, menders and aerators, and to attach massage and hair sprays to spigots; and that all the hose fittings, except the clinching couplings, are reusable.

Respecting the sink strainer bases, Mrs. Colleluori testified that those articles are used in a sink to prevent sediment from going down the drain, and she regarded the strainer bases as "sanitary wares".

On cross-examination, Mrs. Colleluori testified that while the plain couplings and the menders were "reusable", they were normally intended to remain inserted in the hose so long as the hose remained functional; that the 0137X and 0138X hose menders (exhibits 3 and 6) are listed in plaintiff's catalog (exhibit 12, page 225) under the "Industrial Hose and Fittings" section; that page 224 of the catalog, which is also in the "Industrial Hose and Fittings" section, lists zinc brass plated garden hose couplings in sizes ⅜", ½", ⅝" and ¾"; that the 0190 couplings listed in the "Industrial Hose and Fittings" section of plaintiff's catalog (page 224) is the same article as the 0190X ½" coupling represented by exhibit 7; that the 0189, 0191 and 0192 couplings listed on page 224 of plaintiff's catalog under the "Industrial Hose and Fittings" section are the same as the 8000XCD, 8002XCD and 8003XCD plain couplings respectively represented by collective exhibit 1; that the 0115 ½" male coupling shown on page 224 of plaintiff's catalog is the same coupling as the 8009XCD male ½" coupling represented by exhibit 9; that the 0116 ⅝" male coupling shown on page 224 of plaintiff's catalog is the same coupling as the 8010XCD ⅝" male coupling represented by exhibit 10; and that the

0117 ¾″ male coupling shown on page 224 of the catalog is the same coupling as the 8011XCD coupling included in exhibit 1.

Plaintiff called as its second witness Gertrude Cohn, who, with her husband, owned and operated a hardware store in Philadelphia from 1935 to 1972. The hardware store "handled most all household articles and sanitary supplies" (R. 69).

Mrs. Cohn testified that in her "various travels" in New York, Pennsylvania, Nevada, California, New Jersey and Florida she observed the use of the hose fittings; that the plain couplings and clinching couplings were used for the same purpose—repair hoses; that the couplings were household articles used on rubber or plastic garden or lawn hoses, on washing machine hoses, on the ends of "Y's" which connect hot and cold water spigots, and with shampoo sprays that screw onto a spigot; that she knew of no industrial uses for the couplings; and that the plain couplings were reusable—"you can take it off or put it back on any time you wish whenever it is necessary" (R. 76).

Respecting the hose menders, Mrs. Cohn testified that they were used with clamps to repair ⅜″ to ⅝″ plastic or rubber lawn hoses used around the home; that she knew of no other use for the menders and that the menders were reusable.

Relative to the adjustable clamps, Mrs. Cohn testified that they were installed on rubber or plastic garden hoses up to ⅝″; that she had "seen them on garden hose, household garden hoses, almost in any household in the country" (R.83); that the clamps were used: to hold repair couplings and menders on hoses; to hold "shower hoses" tightly to the spigots; to hold "drain fills" on hoses, as shown on page 132 of plaintiff's catalog; to hold snap-on couplings to faucets, as shown on page 134 of plaintiff's catalog; to hold faucet adapters, as shown on page 135 of plaintiff's catalog; on tailpieces which are small pieces of hose with an adapter on the end of them, for use on spigots, as shown on page 135 of plaintiff's catalog; and to hold air hose couplings, as shown on page 225 of plaintiff's catalog. Mrs. Cohn further asserted that the clamps are reusable—"[y]ou just unscrew them and take them off" (R.84); and that she would categorize the couplings, menders and clamps as "household articles" since "[t]hey are used in the household for household purposes only *as far as we were concerned in the store*" (R.80).

Additionally, Mrs. Cohn testified that she makes a distinction between "household articles" and "parts of household articles"; that the former "is something in itself, in its entirety" while the latter "are items that cannot be used in and of themselves [and] * * * have to be used with something else" (R.81–82); that she considered the couplings, menders and clamps to be "household articles"; and that

she "would consider anything that is used in the household as a household article" (R.84).

On cross-examination, Mrs. Cohn reluctantly admitted that the couplings and menders when attached to hoses were parts thereof for the life of the hose. The record shows the following (R.89–90):

> Q. On the question of whether or not these articles are reusable or whether or not they are permanent,when you attach articles as represented by Plaintiff's Collective Exhibits 1, 7, 9, and 10, the plain hose and couplings, are they intended to remain with the hose?—A. They could remain, but they don't have to remain. They can come off, sir.
>
> Q. Normally, would you take them off?—A. If the hose would break, I would take it off and use it again.
>
> Q. During the life of the hose they would remain on the hose?—A. Yes.
>
> Q. And, similarly, for the menders when inserted?—A. Yes. Once you insert them, you usually leave them there.
>
> Q. There is no reason to take them out; they become part of the hose?—A. Unless the hose is gone and you want to fix——
>
> Q. They would be part of the hose when attached?—A. Yes.

Mrs. Cohn also testified on cross-examination that she could tell that a mender was *inside* a hose by "looking" and by feeling the hose; that the clamps which appear on page 225 of plaintiff's catalog, which she testified were used on air hoses, are in the section of the catalog for "Industrial Hose and Fittings"; and that on that same page 225 also appears the 0137 and 0138 hose menders, which indicated to her that these menders were used in industrial applications, although she had never sold them for such purpose.

On further cross-examination, Government counsel questioned Mrs. Cohn concerning her distinction between "household articles" and "parts of household articles". After insisting that the fittings were used by themselves in the household (R.97), she subsequently conceded that the fittings would have to be joined to a hose to function, and could not be used by themselves (R.99).

On redirect examination, Mrs. Cohn testified that none of the articles before the court were used with hose ¾" or larger; that the articles were used with ⅜" to ⅝" hoses; and that she considered hoses ¾" or larger as "industrial" (R.101).

On recross-examination, Mrs. Cohn stated with reference to the ¾" hose couplings (8003 and 8011 in exhibit 1) that "to me they are industrial, I never handled them. I really don't know what they are used for" (R.101–102).

With reference to the sink strainer bases, Mrs. Cohn testified that these articles were used in sink basins to keep dirt and other things from going into the drain "which makes it sanitary" (R.72); and that

the base portion is used as a strainer and holds the flat strainer portion.

Defendant's first witness was Samuel Bailey, vice president since 1972 of H. J. Murray & Company, Incorporated of New York City, a wholesale industrial supplier and a specialty house in hose couplings. Murray represents companies which manufacture couplings used for industrial water, steam and air hoses, hose clamps, and menders. It appears that Murray sold in approximately twenty states to rubber hose distributors, contractors' supply and equipment houses, and industrial and mill supply houses. Prior thereto, from 1969 to 1972, Mr. Bailey was the sales manager for the Le-Hi Division of Parker-Hannifin, a manufacturer of industrial hose fittings, including those utilized for air, water and steam. The Le-Hi Division sold its products nationwide to about 15,000 accounts comprising manufacturers of air, steam, water and hydraulic hoses, hose distributors, mill supply houses, contractors' supply houses, plumbing and pipe supply houses, and original equipment manufacturers. At the time of the trial, Bailey had been actively engaged in the industrial hose coupling business for about 16 or 17 years.

Mr. Bailey testified that the zinc die cast brass plated water hose couplings represented by defendant's exhibit A, which were manufactured by Parker-Hannifin Corporation, were "similar in all material conditions" to the zinc die cast brass plated water hose couplings represented by plaintiff's exhibits 1, 7, 9 and 10 (R.114); that these couplings were sold in the years 1970 and 1971 throughout the United States by the Le-Hi Division of Parker-Hannifin, of which he was then product sales manager, through some 7,500 industrial accounts comprising hose distributors, hose manufacturers, contractors' supply houses, and mill and industrial suppliers for use on industrial water hose; that the couplings were not sold with clamps inasmuch as clamps were sold separately by the company; that the couplings were sold in three sizes—½", ⅝" and ¾"—and had garden hose thread; and that the Le-Hi Division did not utilize channels of distribution that catered to the retail homeowner type trade but only solicited industrial accounts.

Mr. Bailey further stated that the wrought brass clincher type water hose couplings represented by defendant's collective exhibit C were the same in design and function as, but different in composition from, the zinc die cast brass plated couplings in plaintiff's collective exhibit 2; that the couplings represented by exhibit C were sold in the years 1970 and 1971 in the industrial hose market in competition with the products of his employer, the Le-Hi Division of Parker-Hannifin; that in his opinion, and based upon his experience, the clinching type couplings represented by plaintiff's collective exhibit 2

were more appropriate for, and more in demand for use in, industrial applications than those represented by defendant's collective exhibit C, because the plaintiff's clinching couplings were "a heavier duty fitting", less likely to be crushed, and less expensive.

Additionally, Bailey testified that the Parker-Hannifin galvanized hose clamps, represented by defendant's collective exhibit F, are the same as those sold in 1970 and 1971 by that company when he was product sales manager, and that they are currently sold by H. J. Murray & Co., Inc.; that they were sold in 1970 and 1971 to the same industrial outlets, hose distributors, hose manufacturers, contractors' supply houses, and industrial supply houses as the couplings; that they were principally used on air and water hoses in industrial applications; that they are similar in size and design and are of the same gauge as the clamps represented by plaintiff's exhibits 4, 8 and 11, although the smallest and middle size were slightly heavier in weight than plaintiff's exhibits 8 and 4, respectively.

Finally, Bailey testified that the chief use of the couplings and clamps which he identified was to couple industrial air and water hoses.

On cross-examination, Mr. Bailey testified that he had observed couplings such as those in defendant's exhibits used in connection with lawn hoses at his home and on his neighbor's lawn.

Defendant's second witness was Joseph C. Gadd, Jr., president of the J. C. Gadd Company of Denver, Colorado. During the period of April 1970 to February 1971, Mr. Gadd was vice president of the J. C. Gadd Company.

In 1970 and 1971, the Gadd Company manufactured and sold zinc die cast brass plated garden hose couplings (represented by defendant's collective exhibit H) and zinc die cast hose menders (represented by defendant's collective exhibit I), which couplings and menders were the same in function, design, construction, material and sizes as plaintiff's zinc die cast brass plated garden hose couplings (represented by exhibits 1, 7, 9 and 10) and plaintiff's zinc die cast hose menders (represented by exhibits 3 and 6). The Gadd Company, however, did not manufacture or sell any clamps. During the period of 1970 through the first quarter of 1971, the Gadd Company sold its hose fittings to 31 customers in 13 states "from New York to California and from Minnesota to Florida" (R.161–162). Gadd's customers included hose manufacturers, hose distributors, equipment manufacturers and general industrial distributors. In essence, 97½% of Gadd's sales were made to "industrial accounts" and 2½% of sales were made to organizations of unknown types. No sales were made to homeowners, retailers or to jobbers that stock retailers.

Mr. Gadd stated that his couplings were used in water hose, washing machine hose, and low pressure air, gas and water applications; and the menders were used in low pressure water hoses and washing machine hoses.

Respecting the question whether the couplings and menders are parts of hoses, the witness testified as follows (R.167):

> Q. Mr. Gadd, when either the couplings or the menders are inserted in or are utilized in a hose, do you consider that [it] becomes a permanent part of the hose?—A. Yes. The coupling has no separate use from the hose.
>
> Q. It would remain in the hose?—A. It would not be functional until coupled to the hose and, once coupled to the hose, would be a permanent part of the hose.

On cross-examination, Mr. Gadd stated that his customers used the hose menders to join remnant hoses to form the desired lengths of garden or other hoses intended for low pressure applications; that both the couplings and menders were used in lawn hoses; that he did not sell his couplings and menders with clamps because "[c]lamps are readily available from other sources and we would have no unique advantage in offering the same for sale" (R.172); that his couplings and menders were not sold carded but only in bulk; that in his business the majority of "clamps" used with hoses are external ferrules of annealed brass which are crimped over the outside of the hose and are not reusable; and that the menders, plain couplings and clamps could be removed from a hose and reused on another hose.

On redirect examination, Mr. Gadd testified that while the couplings would take a pressure of up to 150 pounds, the normal pressure of a household lawn hose is 40 to 60 p.s.i.; that therefore the couplings were not limited to lawn or garden hoses; and also that when he used the term "lawn hose" he was referring to a water hose. With reference to chief use, Gadd stated (R.178):

> Q. And from your knowledge of your products and through whom they are sold, and to whom they are sold, what is your understanding of the chief use of your couplings and menders? What types of hose are they used in?—A. They are used in low pressure industrial hose.
>
> Q. That would be the chief use of the couplings and menders?—A. Yes.

On recross and re-redirect examination, Mr. Gadd testified that "unlike other witnesses," he did not inspect garden hoses when he went visiting in various states (R. 179), but that "[n]obody can quarrel with the fact that every state has people that use lawn hoses" (R. 182); that the couplings represented by exhibits 1, 7, 9 and 10 (plain

couplings) are the type that are *used* by homeowners in and around their homes; but that significantly the *chief use* of the couplings represented by defendant's exhibit H (which are identical in construction, material, design and function to plaintiff's exhibits 1, 7, 9 and 10) was in industrial hose.

Defendant's third and final witness was Theodore H. Johnson, plumbing and fittings product manager for American Standard. Mr. Johnson testified concerning the commercial meaning of "sanitary ware" as follows (R.190):

> A. Sanitary ware, in the plumbing industry and in American Standard, is identified as a receptacle or vessel to receive, hold, or discharge water or other fluids. It is in the plumbing industry primarily a material; vitreous china, or cast iron, or enameled cast iron, enameled stamped steel, stainless steel, or plastic or fiberglas, but it is a container, basically.
>
> Q. And how do you refer to those articles that you would sell that would meet the definition of sanitary ware?—A. Bath tubs, toilets, lavatories, sinks.
>
> Q. And what general term do you use to include all of those articles?—A. Fixtures. Those are fixtures.

Moreover, Johnson stated that a sink strainer base (exhibit 5) was known in the plumbing industry as a "fitting"; that he considered the strainer base to be "independent of the fixture" since fixtures or sanitary wares are not sold with fittings attached; that the function of the strainer base is to receive and direct the flow of the waste water from the fixture into the drainage and waste system of the building; and that he did not consider the strainer base to be part of sanitary ware or part of the sink to which it is attached.

Mr. Johnson added that the strainer base is inserted into the opening of a sink and connected with a locknut; that a wrench is required to install the strainer base into the sink, and there must be a tight joint.

On cross-examination, Johnson testified that exhibit 5 fits into the sink so as to make it watertight, and water will flow out only through the strainer base; that normally the strainer base remains attached to the sink for the life of the sink; that "it is necessary to have some kind of a drainage outlet to a sink to insure sanitation and cleanliness" (R.197); that a sink will not operate effectively without a device such as exhibit 5; and that exhibit 5 was used for sanitary purposes.

Hose Fittings (Couplings, Menders, and Clamps)

The parties have stipulated that the "snap on" type couplings in entry No. 134705 are properly dutiable under item 654.20, TSUS, as modified, at the rate of 10 per centum ad valorem. Hence, the hose fittings in dispute are: (1) plain couplings; (2) clinching couplings;

(3) menders; and (4) adjustable clamps. Respecting these four categories of hose fittings the issues are: (1) whether they were chiefly used in the household, and (2) whether they are parts of rubber or plastic hoses.

CHIEF USE ISSUE

The provision for household articles is a use provision. By statute, the use which governs is "the use in the United States at, or immediately prior to, the date of importation, of articles of that class or kind to which the imported articles belong, and the controlling use is the chief use, i.e., the use which exceeds all other uses (if any) combined". General Interpretative Rule 10(e)(i). *See also United States* v. *Parksmith Corporation*, 62 CCPA 76, C.A.D. 1149, 514 F.2d 1052 (1975). Hence, pursuant to its claims under items 653.95 and 654.20, plaintiff had the burden of establishing that the chief use of the class or kind of hose fitting to which each category of merchandise belongs was as household articles. Plaintiff contends that the chief use of the hose fittings was in the repairing of lawn or garden hoses used in and around the household. Defendant, on the other hand, insists that the fittings were chiefly used in air and water hoses for industrial applications, where the fittings were used to couple or join sections or remnants of hose to desired lengths, rather than used to repair hoses used around homes.

From a review of the record, I have concluded that in 1970–71 hose fittings of the classes and kinds involved here were used in the United States for industrial water and air hoses as well as for household hoses, and that plaintiff failed to prove that household use predominated. *Cf. Kotake Co., Ltd., Standard Trading Co., Ltd.* v. *United States*, 67 Cust. Ct. 178, C.D. 4271 (1971); *Charles H. Demarest, Inc.* v. *United States*, 62 Cust. Ct. 583, C.D. 3829 (1969); *Voss Int. Corp.* v. *United States*, 61 Cust. Ct. 123, C.D. 3544, 287 F. Supp. 989 (1968); *Providence Import Co., Inc.* v. *United States*, 55 Cust. Ct. 243, C.D. 2584 (1965).

Although defendant's witnesses Bailey and Gadd conceded that the involved fittings were used on household garden hoses, they nevertheless testified that the chief use of the articles was in industrial air and water hose applications. It is now well settled that sales and marketing executives concerned with the promotion and merchandising of a product over a wide geographic area [2] may give testimony concerning the product's chief use. Thus, in *F. B. Vandegrift & Co., Inc.* v. *United States*, 56 Cust. Ct. 103, 111–112, C.D. 2617 (1966), the court aptly observed:

> The Government makes much of the fact that the witnesses Gayer and Howell ceased to go into people's homes to sell this

[2] Bailey's sales' experience was "nationwide", while Gadd's sales covered some thirteen states.

> merchandise years before the dates of importation. This entirely misunderstands the probative weight of the testimony executives can give, who have been concerned in designing, framing specifications, ordering, importing, selling, distributing, and promoting the manufactured article whose chief use is to be determined. Gayer and Howell continued to deal in the involved straighteners and curlers. Such persons have to know the chief uses of what they sell and sporadic instances of their seeing it in use in people's homes (on social occasions perhaps) add but little. One gets rather tired of having such instances dragged in by the ears. * * *

Similarly, in *Inter Maritime Fwdg. Co., Inc.* v. *United States*, 59 Cust. Ct. 412, 419, C.D. 3177 (1967):

> * * * Here, too, there are "infrequent instances of observation of actual use in the testimony." However, this lack is more than compensated for by other compelling evidence by qualified witnesses. * * * The court is of the opinion that persons serving in executive and sales managerial capacities, who recommend that a product be added to their company's line, and who promote, sell, train others to sell, and demonstrate the use of the articles, are in a position to give competent evidence on the chief use of said article.

See also Al Nyman & Son, Inc. v. *United States*, 61 Cust. Ct. 236, C.D. 3585 (1968).

In light of the views expressed by the court in the above-cited cases, I am clear that the testimony of defendant's witnesses Bailey and Gadd have substantial probative value respecting the issue of the chief use of the hose fittings.

Indeed, as an admission of the industrial applications for the hose fittings and as corroborative of the testimony of defendant's witnesses Bailey and Gadd, plaintiff's own sales catalog (exhibit 12) shows that the couplings, menders and clamps were advertised for use on industrial hose. In short, the record demonstrably shows that the hose fittings in issue were sold for industrial as well as household applications. Under these circumstances, it was incumbent upon plaintiff at the minimum to disclose the facts within its possession relating to its own marketing experience during the relevant period of time concerning which the record is silent. *Cf. Nyman, supra.* Instead of sales or marketing data, plaintiff adduced the testimony of its import manager (Mrs. Colleluori), an employee who did not claim to have any knowledge concerning plaintiff's sales, and whose principal qualification relative to the marketplace was that she worked in a hardware store evenings and on weekends. Mrs. Colleluori, ostensibly, was unaware of the industrial applications for the hose fittings despite the plain indication to the contrary in plaintiff's catalog, which she identified at the trial.

In sum, plaintiff's witnesses were aware of only household uses for the fittings, and offered no testimony which is helpful to the court in

determining their *chief* use. Defendant's witnesses (Bailey and Gadd), on the other hand, were aware of both the household and industrial uses for the fittings, and stated that their chief use was in industrial water and air hoses.

Plaintiff emphasizes that "many" of the plain hose couplings and menders were imported "carded", viz., packaged with clamps on a card. However, the testimony and exhibits demonstrate that the couplings and menders sold uncarded and without clamps are identical to the same items sold carded with clamps, the only difference being the stock number assigned to the article. Moreover, plaintiff's witnesses made no distinction in use between the carded couplings and menders and the same articles sold uncarded. Therefore, for purposes of determining chief use, each category of merchandise, i.e., plain couplings, menders and clamps, represents a "class" or "kind" of merchandise whether the articles were sold carded or uncarded.

Plaintiff also emphasizes that homeowners having a lawn use garden hoses. While, of course, it is indisputable that homeowners use garden hoses, this fact does not mean that the court may infer or take judicial notice of the chief use of the class or kind of hose fittings involved in the case. It is important to note that the issue is not the chief use of *garden hoses*, as implied by plaintiff's argument, but rather the chief use of the classes and kinds of *fittings* involved here. While it may be true that garden hoses are chiefly used by homeowners,[3] it does not necessarily follow that the classes or kinds of fittings involved here were chiefly used in household garden hoses. Since the record shows that the fittings were used in industrial air and water hoses, as well as by homeowners, and there is controversy between the parties respecting the chief use of the fittings, chief use in the household had to be established by evidence. And on this issue, plaintiff had the burden of proof. As the appellate court observed in *L. Tobert Co., Inc.* v. *United States*, 41 CCPA 161, 164, C.A.D. 544 (1953):

> While judicial notice may be taken of well known uses of an article, chief use is a question of actual fact which, in a case of this character, should be established on the basis of positive testimony representative of an adequate geographical cross section of the nation. * * *

See also Tanross Supply Co., Inc. v. *United States*, 58 CCPA 26, 35, C.A.D. 1000, 433 F. 2d 1332 (1970).

Finally, I have carefully considered and find totally without merit plaintiff's unfounded contentions respecting "surprise"; defendant's

[3] It is, of course, also true that garden hoses are commonly used by motels, restaurants, country clubs beaches, camps, parks, schools, garages, golf courses, cemeteries, and by most commercial buildings having water connections threaded for a garden hose. Plainly, garden or lawn hoses are not inherently household articles.

alleged concealment of evidence; the failure to furnish plaintiff the names of witnesses to be called at the trial; and plaintiff's alleged lack of opportunity for discovery relative to the issue of chief use.

Parts Issue

Defendant argues that the hose fittings are not classifiable as household articles of metal, or parts thereof, because the fittings are parts of rubber or plastic hoses. Plaintiff contends that the hose fittings are independent "articles" rather than "parts" because they can be easily and quickly disconnected from a repaired hose (except the clinching couplings), and can be reused to repair other hoses.

I have concluded that the hose fittings in issue are parts of rubber or plastic hoses, and consequently are not classifiable as parts of household articles of metal, even assuming *arguendo* that the rubber or plastic hoses utilizing the fittings were chiefly used in the household.

The record shows that the couplings, menders and clamps were dedicated to use with rubber or plastic hoses, and that such fittings had no independent usefulness. While it may be true that the plain couplings, menders and adjustable clamps could be removed from one hose and reused on another hose, plaintiff's witnesses conceded—and Mr. Gadd testified—that once installed in a hose, the fittings normally remained attached thereto and became parts of the hose for its useful life (R.50–51, 89–90, 167). Additionally, it is obvious that when installed in a hose the fittings serve a useful function. Whether the couplings be of the "plain" or "clinching" type, they provide a means for a hose to be coupled to a water outlet, another hose, a nozzle or a sprinkler. The menders permit short lengths of hose to be joined together to form longer lengths, while the clamps provide the means for holding the plain couplings and menders in the proper position after insertion into the hoses.

In view of the foregoing facts, the hose couplings, menders and clamps conform to the criteria established by the judicial authorities for "parts". Hence, the fittings are dedicated to a sole specific use and serve a useful function when attached to the parent article. See *Gallagher & Ascher Company* v. *United States*, 52 CCPA 11, C.A.D. 849 (1964); *Trans Atlantic Company* v. *United States*, 48 CCPA 30, C.A.D. 758 (1960); *Border Brokerage Company, Inc.* v. *United States*, 58 Cust. Ct. 240, C.D. 2948 (1967).

Strainer Bases

The sink strainer bases involved herein, as represented by plaintiff's exhibit 5, are claimed to be properly classifiable as sanitary wares

or parts of sanitary wares under item 653.95, TSUS. The following facts are established by the record: The strainer bases are dedicated solely to use in sinks. Upon installation, the base is permanently connected to the sink with a locknut and requires a watertight fit. Obviously, the base is designed to fit into the sink, and the outlet of the sink is specially designed to accommodate the base. Normally, after installation, the base remains installed in the sink for the life of the sink. The base serves an essential function in receiving and directing the flow of the waste water from the fixture into the drainage and waste system to which it is connected. Plainly, then, the sink is incomplete and will not operate effectively to discharge water into the drainage system without a device such as a strainer base.

There is no dispute between the parties that *sinks* are "sanitary wares", and defendant's witness Johnson so testified (R.190). In *The Westbrass Company* v. *United States*, 67 Cust. Ct. 334, 337, C.D. 4293 (1971), writing for the Second Division of the Ccurt, I found: "The strainer base becomes a permanent part of the sink and directs water in the sink into the outlet drain pipe". Additionally, in *Hancock Gross Mfg., Inc.* v. *United States*, 60 Cust. Ct. 558, 565, C.D. 3459, 285 F. Supp. 168 (1968), the Court found that "the [strainer] base * * *, after installation, becomes a permanent part of a sink". Following the rationale of the parts cases cited *supra* in connection with hose fittings, clearly the strainer bases are parts of sanitary wares, viz.: sinks, and thus are dutiable under item 653.95, as claimed by plaintiff.

Even if the bases could be regarded as an auxiliary or optional feature of a sink (which I do not find), since they are dedicated to a sole specific use and serve a useful function when installed in a sink, they are "parts". *Gallagher & Ascher*, *supra* (auxiliary automobile heater, which was an optional feature that could be installed at additional cost over and above the basic price of the vehicle, held, parts of automobiles). Consequently, the facts that the strainer base is referred to in the plumbing industry as a "fitting", that it is not sold with the sink, and that it is not included in the price of the latter are not determinative of whether the base is classifiable as a part. *Cf. Victoria Distributors, Inc.* v. *United States*, 57 CCPA 76, C.A.D. 979, 425 F.2d 759 (1970); *Victoria Distributors, Inc.* v. *United States*, 57 CCPA 80, C.A.D. 980, 425 F.2d 763 (1970).

Conclusion

In accordance with the stipulation of the parties, the snap-on type hose couplings 0424X and 0426X in entry No. 134705 are properly dutiable at the rate of 10 per centum ad valorem under item 654.20, TSUS, as modified by T.D. 68–9. For the reasons set forth above, the

sink strainer bases are properly dutiable at the rate of 11.5 per centum ad valorem under item 653.95, TSUS, as modified by T.D. 68–9, as claimed by plaintiff, Plaintiff's claims respecting all other merchandise are dismissed.

Judgement will be entered accordingly.

(C.D. 4663)

R. W. SMITH & CO., INC. *v.* UNITED STATES

On Plaintiff's Motion and Defendant's Cross-Motion for Summary Judgment

Court Nos. 71–10–01250 and 71–10–01251
on spring clothespins

Port of Houston

[Defendant's cross-motion granted.]

(Dated June 28, 1976)

Barnes, Richardson & Colburn (*Edward F. Christopher* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Carol A. Calhoun*, trial attorney), for the defendant.

MALETZ, Judge: The above actions, which are before the court on cross-motions for summary judgment, are hereby ordered consolidated pursuant to rule 10.3(a) inasmuch as they involve the same plaintiff-importer, the same merchandise and the same issues of law.

The merchandise in question consists of spring clothespins assessed with duty at 20 cents per gross under paragraph 412 of the Tariff Act of 1930, pursuant to Presidential Proclamation No. 3211.

Entry 2686–H, the subject of Court No. 71–10–01250, which we shall consider first, was liquidated on November 22, 1961 by the collector of customs at Houston, Texas. Prior thereto, on October 18, 1961, Presidential Proclamation No. 3211 was declared void in *Falcon Sales Company et al.* v. *United States*, 47 Cust. Ct. 129, C.D. 2292, *appeal dismissed*, 49 CCPA 139 (1962).

On May 10, 1963, plaintiff filed a protest against the liquidation, requesting a "re-liquidation" of the entry and citing therein the decisions of this court in *Falcon* and in *C. O. Mason, Inc.* v. *United States*, 49 Cust. Ct. 89, C.D. 2364 (1962) [1] which held that a liquidation based

[1] Affirmed, *United States* v. *C. O. Mason, Inc.*, 51 CCPA 107, C.A.D. 844 (1964). The protest therein, which was filed from one to three years after the liquidation of the involved entries, was dismissed by the court for prematurity.

upon an unconstitutional statute is void; that a void liquidation does not start the running of the 60-day period prescribed in section 514 of the Tariff Act of 1930, for the filing of protests; that any protest filed thereon is premature; and that it is the collector's duty to liquidate the entry in accordance with the law.[2]

Plaintiff's protest was reviewed and denied on June 17, 1963 by the collector on the ground that the "protest was not received within the [60-day] statutory period." Pursuant to the statutory procedures then in effect,[3] the protest and official papers were forwarded to this court and assigned protest No. 63/12071.

In 1968, our appellate court, applying the rationale of its decision in *United States* v. *C. O. Mason, Inc.*, *supra* (note 1, *supra*), held that a liquidation based on a void Presidential proclamation (specifically Presidential Proclamation 3211) is void; that a void liquidation does not start the running of the 60-day period of limitations of section 514, *supra;* that, consequently, a protest filed respecting the "liquidated" entry is premature; and that it is the duty of the collector to make a valid liquidation of the entry pursuant to law. *United States* v. *Cajo Trading, Inc.*, 55 CCPA 61, C.A.D. 934 (1968), *cert. den.*, 393 U.S. 827 (1968).

Following the *Cajo* decision, the Commissioner of Customs, on May 9, 1969, published T.D. 69–117 (3 Cust. Bull. 362) which stated as follows:

> In the case of *United States* v. *Cajo Trading, Inc.*, the United States Court of Customs and Patent Appeals held, in a decision dated February 15, 1968, published as C.A.D. 934, that a liquidation made pursuant to a Presidential proclamation later declared

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[2] Section 514 (19 U.S.C. 1514) then in effect provided, in pertinent part, that—

Except as provided in subdivision (b) of section 1516 of this title . . . all decisions of the collector, including the legality of all orders and findings entering into the same, as to the rate and amount of duties chargeable, and as to all exactions of whatever character (within the jurisdiction of the Secretary of the Treasury), . . . under any provision of the customs laws, and his liquidation or reliquidation of any entry, . . . shall, upon the expiration of sixty days after the date of such liquidation, reliquidation, decision, . . . be final and conclusive upon all persons (including the United States and any officer thereof), unless the importer, consignee, or agent of the person paying such charge or exaction, . . . shall, within sixty days after, but not before such liquidation, reliquidation, decision, . . . as the case may be, as well in cases of merchandise entered in bond as for consumption, file a protest in writing with the collector setting forth distinctly and specifically, and in respect to each entry, payment, claim, decision, . . . the reasons for the objection thereto. The reliquidation of an entry shall not open such entry so that a protest may be filed against the decision of the collector upon any question not involved in such reliquidation.

[3] Section 515 of the Tariff Act of 1930 (19 U.S.C. 1515) provided, in pertinent part, that—

Upon the filing of such protest the collector shall within ninety days thereafter review his decision, and may modify the same in whole or in part and thereafter remit or refund any duties, charge, or exaction found to have been assessed or collected in excess, ... If the collector shall, upon such review, affirm his original decision, . . . and, in the case of merchandise entered for consumption, if all duties and charges shall be paid, then the collector shall forthwith transmit the entry and the accompanying papers, and all the exhibits connected therewith, to the United States Customs Court for due assignment and determination, as provided by law. Such determination shall be final and conclusive upon all persons, and the papers transmitted shall be returned, with the decision and judgment order thereon, to the collector, who shall take action accordingly, except in cases in which an appeal shall be filed in the United States Court of Customs and Patent Appeals within the time and in the manner provided by law.

invalid is void, and therefore fails to start running the 60-day period provided in section 514, Tariff Act of 1930, for the filing of protests. Certiorari was denied on October 14, 1968.

Since the Supreme Court has denied certiorari in this case and since the Government does not intend to further litigate the questions involved, requests by importers to apply this decision and to reliquidate entries, or to certify stipulations regarding entries under protest and pending before the United States Customs Court shall be honored only where, (1) the original liquidation was made under a Presidential proclamation held to be void in a final decision of the United States Customs Court and (2) where the official original entry records are available to the District Director.

Such reliquidation or certification of a stipulation shall not be accomplished based upon unofficial entry documents.

During the period from 1963 to 1969, protest No. 63/12071 was subject to the following actions: suspended on March 19, 1964 under protest No. 61/11342; suspended on February 16, 1967 under Appeal No. 5263 (*United States* v. *Cayo Trading, Inc., supra*); continued (after removal from the suspension calendar) on March 11, 1969; continued and returned to Houston on June 6, 1969; and dismissed at the calendar call in Houston on November 10, 1969 for lack of prosecution upon the government's motion, with appearance by plaintiff noted.[4] The order of dismissal was entered on September 3, 1970.

Plaintiff neither moved for rehearing therein nor took an appeal from the order of dismissal.

By letter dated October 8, 1970, plaintiff requested the district director of customs at Houston to refund the duties collected on entry 2686–H which was the subject of the above-dismissed protest. The request was denied on January 18, 1971 and protest No. 5301–1000114 was filed on April 10, 1971 against the district director's refusal to "reliquidate" the entry. The protest alleged that the proper rate of duty was 10 cents per gross and stated:

> The Pres. Proc. increasing the duty on such mershandise [sic] was void and any previous purported liquidation based thereon was likewise void for the reasons set forth in CAD 934. The entry should be "liquidated" under the direction [sic] in T.D. 69/117.

The protest was denied on April 12, 1971 on the ground that "There is no basis for administrative relief & this office cannot reverse a

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[4] The status of the protest and dispositions thereof are shown on the Calendar Card which was retained with protest No. 63/12071.

Rule 5(b) of this court in effect during this period, provided that—

> Whenever it shall be made to appear to a division of this court or a judge before whom a cause, action, or proceeding is pending that the same is not being prosecuted with due diligence, the court may, either upon its own motion or upon the motion of any interested party, enter an order dismissing the said cause, action, or proceeding for lack of prosecution.

decision of the U.S. Customs Court (previous protest dismissed, judgment of the court dtd 9–3–70.)"

The summons in the case first being considered (Court No. 71–10–01250) was filed on October 4, 1971, and plaintiff's motion herein for summary judgment was filed in November 1975. The motion alleges that the liquidation in question is void and that the protest must be dismissed as premature; however, the motion is accompanied by a proposed order *sustaining* the protest and ordering the district director to liquidate the entry pursuant to T.D. 69–117.

In support of its motion, plaintiff cites the *Falcon Sales* and *Cajo Trading* cases as authority for the proposition that this court "had no jurisdiction over the original protest [No. 63/12071] and could not lawfully dismiss for lack of prosecution." Therefore, plaintiff asserts, its "rights were never lawfully at issue" and "the basis for the instant cause of action did not arise until the District Director . . . refused to liquidate or 'reliquidate' the entry in question on January 18, 1971."

Defendant contends on its cross-motion for summary judgment that the dismissal of protest No. 63/12071 was a final adjudication on the merits and that the doctrine of res judicata is a bar to the instant action. The defendant also asserts that the *C. O. Mason* and *Cajo Trading* holdings are inapplicable herein but, even if deemed applicable, should not be followed. Finally, it argues that plaintiff's claim should be barred under the doctrine of laches.

Although framed in different terms by the parties, the pivotal issue herein is whether the judgment of this court dismissing protest No. 63/12071 for lack of prosecution is open to collateral attack on the ground that the court lacked jurisdiction in that action.

As noted, the claimed jurisdictional defect asserted by plaintiff is based on the holding in *Cajo Trading* that the court lacks jurisdiction over a protest filed against a liquidation that is void because it was made pursuant to an invalid Presidential proclamation and that the protest must be dismissed for prematurity inasmuch as the time for its filing had not commenced to run.

We find that under the circumstances here outlined it is too late to raise the question of jurisdiction.

Under the doctrine of res judicata a judgment entered in an action is conclusive as to all matters that were or might have been litigated or adjudged therein. *Partmar Corporation* v. *Paramount Pictures Theatres Corp.*, 347 U.S. 89 (1954); *Commissioner* v. *Sunnen*, 333 U.S. 591 (1948); *Chicot County Drainage District* v. *Baxter State Bank*, 308 U.S. 371 (1940); *Cromwell* v. *County of Sac*, 94 U.S. 351 (1876).

Thus, res judicata serves as a bar to relitigation of the same matters in a subsequent action between the same parties.

In this connection res judicata applies to suits involving a question as to jurisdiction over the subject matter where that identical issue was raised and decided in a prior action. *Stoll* v. *Gottlieb*, 305 U.S. 165 (1938), *rehearing denied*, 305 U.S. 675 (1938).[5] *Skillern's Executors* v. *May's Executors*, 10 U.S. (6 Cranch) 267 (1810).

Res judicata has also been applied where the question of jurisdiction could have been raised in the prior proceeding, but the party who might have raised it failed to do so. Thus, in *Chicot County Drainage District* v. *Baxter State Bank*, *supra*, Mr. Chief Justice Hughes declared (308 U.S. at 376, 378):

> . . . The argument is pressed that the District Court was sitting as a court of bankruptcy, with the limited jurisdiction conferred by statute, and that, as the statute was later declared to be invalid, the District Court was without jurisdiction to entertain the proceeding and hence its decree is open to collateral attack. We think the argument untenable. The lower federal courts are all courts of limited jurisdiction, that is, with only the jurisdiction which Congress has prescribed. But none the less they are courts with authority, when parties are brought before them in accordance with the requirements of due process, to determine whether or not they have jurisdiction to entertain the cause and for this purpose to construe and apply the statute under which they are asked to act. Their determinations of such questions, while open to direct review, may not be assailed collaterally.
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> * * * * * * *
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> The remaining question is simply whether respondents, having failed to raise the question in the proceeding to which they were parties and in which they could have raised it and had it finally determined, were privileged to remain quiet and raise it in a subsequent suit. Such a view is contrary to the well-settled principle that *res judicata* may be pleaded as a bar, not only as respects matters actually presented to sustain or defeat the right

[5] In *Stoll*, Mr. Justice Reed stated (305 U.S. at 171–72, footnotes omitted):

> . . . Every court in rendering a judgment, tacitly, if not expressly, determines its jurisdiction over the parties and the subject matter. An erroneous affirmative conclusion as to the jurisdiction does not in any proper sense enlarge the jurisdiction of the court until passed upon by the court of last resort, and even then the jurisdiction becomes enlarged only from the necessity of having a judicial determination of the jurisdiction over the subject matter. When an erroneous judgment, whether from the court of first instance or from the court of final resort, is pleaded in another court or another jurisdiction the question is whether the former judgment is *res judicata*. After a federal court has decided the question of the jurisdiction over the parties as a contested issue, the court in which the plea of *res judicata* is made has not the power to inquire again into that jurisdictional fact. We see no reason why a court, in the absence of an allegation of fraud in obtaining the judgment, should examine again the question whether the court making the earlier determination on an actual contest over jurisdiction between the parties, did have jurisdiction of the subject matter of the litigation. In this case the order upon the petition to vacate the confirmation settled the contest over jurisdiction.
>
> Courts to determine the rights of parties are an integral part of our system of government. It is just as important that there should be a place to end as that there should be a place to begin litigation. After a party has his day in court, with opportunity to present his evidence and his view of the law, a collateral attack upon the decision as to jurisdiction there rendered merely retries the issue previously determined. There is no reason to expect that the second decision will be more satisfactory than the first.

> asserted in the earlier proceeding, "but also as respects any other available matter which might have been presented to that end." *Grubb* v. *Public Utilities Comm'n, supra; Cromwell* v. *County of Sac, supra.*

The line of Supreme Court decisions respecting the finality of judgments was followed by this court in *Fulghum & Co.* v. *United States*, 1 Cust. Ct. 284, C.D. 66 (1938), which held that once a judgment has become final and conclusive upon all persons it may not be attacked collaterally. The issue was raised in *Fulghum* by reason of the collector's refusal to reliquidate in accordance with a prior decision that was based upon a stipulation submitted by the parties. Ordering the collector to reliquidate in accordance with the prior judgment, the court stated (1 Cust. Ct. at 286):

> Whether or not this court in its original decision and judgment had jurisdiction of that portion of the merchandise which remained in the warehouse on June 17, 1930, need not be here determined. Suffice it to say that for a long period of time after our judgment became final no one questioned our original jurisdiction over the parties or any portion of the merchandise. It is well settled that under circumstances such as we have here it is now too late to raise the question of jurisdiction. . . .

The court added (1 Cust. Ct. at 287):

> In the case of *Fulghum* v. *United States*, decided by this court on May 7, 1934, even though our jurisdiction over that portion of the merchandise remaining in the warehouse was not affirmatively established, yet our judgment was binding on all persons. If there were any apparent want of jurisdiction of such merchandise, this could have availed the parties in this case only on an appeal, or motion for rehearing. Once our judgment became final upon all persons it was too late to raise any question of jurisdiction.[6]

Another aspect of the finality of judgments is the now settled rule, recently reiterated in *United States* v. *Torch Manufacturing Co., Inc.*, 62 CCPA 41, 509 F. 2d 1187, C.A.D. 1143 (1975), that this court lacks jurisdiction to act upon a motion made more than 30 days after entry of an order of dismissal and to set aside the order since the motion was made after the 30-day limitation period provided in 28 U.S.C. 2639 for motions for rehearing or retrial.[7] The appellate court noted

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[6] See also *Harry Garbey* v. *United States*, 25 CCPA 88, T.D. 49067 (1937), wherein appellant raised a jurisdictional question after mandate had issued from the Court of Customs and Patent Appeals to this court which had entered judgment in accordance therewith. The appellate court held that a judgment or decree of a court of the United States may not be collaterally attacked after final disposition of a case, even though the jurisdictional facts do not appear in the record.

[7] 28 U.S.C. 2639, as amended by the Customs Courts Act of 1970, P.L. 91-271, effective October 1, 1970, provides as follows:

> The judge who has rendered a judgment or order may, upon motion of a party or upon his own motion grant a retrial or a rehearing, as the case may be. A party's motion must be made or the judge's action on his own motion must be taken, not later than thirty days after entry of the judgment or order.

that the terms "rehearing" and "retrial" in section 2639 included cases where the action was dismissed for lack of prosecution but an opportunity for an original hearing or trial was made available. Thus, it held, the 30-day limitation period applied to a case that was dismissed for lack of prosecution and the opportunity for hearing, which was available, was lost through mistake or inadvertence of counsel.

In other words, in the absence of an appeal, failure to make a timely motion for rehearing or retrial renders a judgment of dismissal based on lack of prosecution final as to all matters that might have been litigated so long as the opportunity for an original trial or hearing was made available. See also *Borneo-Sumatra Trading Company, Inc.* v. *United States*, 49 Cust. Ct. 510, A.R.D 150 (1962).

Against this background of judicial decisions, we must consider what effect, if any, the judgment of this court on September 3, 1970, dismissing protest No. 63/12071, has on the instant action.

Plaintiff having failed, as noted, to move for rehearing or to appeal from the decision therein, as provided for at that time in 28 U.S.C. 2640 and 2637,[5] the judgment became final and the collector's determination as to the duty assessment became "final and conclusive upon all persons" (19 U.S.C. 1515, *supra*, note 3). Furthermore, all questions that were raised or could have been raised by plaintiff for determination, including the jurisdiction of the court, were subsumed in the final judgment. Accordingly, res judicata may properly be pleaded as a bar in this action with respect to all such questions. *Chicot County Drainage District* v. *Baxter State Bank*, *supra*.

In order to avoid the application of res judicata, plaintiff seeks to differentiate protest No. 63/12071 from the present action by basing the present action on the district director's refusal to "honor the request that the instant entry be liquidated, or reliquidated, in spite of the instructions contained in T.D. 69–117." (Complaint paragraph 18.) However, plaintiff's effort to delineate the issue in this fashion is merely a ploy to disguise the true nature of plaintiff's claim as set forth in paragraphs 2–9 and 11–16 of the complaint, which (1) recite the background facts as to the liquidation; (2) set forth the effect of the *Falcon Sales* and *Cajo Trading* decisions; and (3) conclude that

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Prior to amendment by the Customs Courts Act of 1970, P.L. 91-271, 28 U.S.C. 2640 provided that—

A division which has decided a case or a single judge who has decided an appeal for a reappraisement may, upon motion of either party made within thirty days next after such decision, grant a rehearing or retrial.

And 28 U.S.C. 2637 provided that—

The decision of a division of the Customs Court, in any matter within its jurisdiction shall be the decision of such court, and shall be final and conclusive upon all parties, unless a party to such proceeding takes an appeal to the Court of Customs and Patent Appeals within the time and manner provided in section 2601 of this title. . . .

the "entry in question has never been liquidated according to law." [9] In sum, the court finds that the earlier action—protest No. 63/12071—and the instant action raise the identical issue for determination, namely, the validity of a liquidation based upon a void Presidential proclamation and the timeliness of a protest filed with respect to that liquidation.

In these circumstances, we must conclude that the judgment of September 3, 1970 dismissing protest No. 63/12071 was determinative of the issue raised therein by plaintiff and that it is res judicata of that same issue raised in the present action.[10] That determination, while open to direct review, may not be attacked collaterally. *Chicot County Drainage District* v. *Baxter State Bank*, *supra*; *Stoll* v. *Gottlieb*, *supra*; *Fulghum & Co.* v. *United States*, *supra*.

At this juncture, it must be added that plaintiff has totally ignored that part of the directive in T.D. 69–117 which had a direct bearing on protest No. 63/12071 while it was still pending before the court. That directive states in pertinent part:

> . . . *requests by importers to apply this decision* and to reliquidate entries, *or to certify stipulations regarding entries under protest and pending before the United States Customs Court shall be honored*. . . . [Emphasis added.]

In other words, T.D. 69–117 authorized Customs to certify stipulations covering entries under protest pending before this court which involved the factual and legal situation that existed with respect to entry 2686–H. However, nowhere in this record is it indicated or even claimed that plaintiff had prepared or submitted for certification a stipulation in accordance with that directive prior to dismissal of the protest. Thus, plaintiff through its own inaction failed to avail itself of the benefit of T.D. 69–117 when it had the opportunity to do so.

Another point to be considered is that plaintiff is estopped by its own actions to attack the prior judgment in this proceeding. It is settled that every court, in rendering a judgment, tacitly, if not expressly, determines its own jurisdiction. *Stoll* v. *Gottlieb*, *supra*. Plaintiff failed through its own dilatoriness and inaction to present to the court in the prior action the essential facts from which the court might well have concluded differently with respect to its jur-

[9] Even if the district director's refusal to act in accordance with the instructions contained in T.D. 61-117 were considered to be a protestable decision, the validity of that directive would be placed in issue, thus returning full circle to the essential question of the validity of a liquidation based upon a void Presidential proclamation.

[10] The res judicata principle is applicable here since both cases involve the same issue, party and importation. A prior judgment determining the classification of imported goods and the applicable rate of duty thereon is not res judicata upon *another* importation of the same kind of goods by the same importer. *United States* v. *Stone & Downer Co.*, 274 U.S. 225 (1927). For a discussion of the distinction between res judicata and collateral estoppel, see *J. E. Bernard & Co., Inc.* v. *United States*, 66 Cust. Ct. 545, 324 F. Supp. 496, R.D. 11739 (1971).

isdiction and rendered a different decision. In Freeman on *Judgments* (5th ed., 1925) § 320 states:

> Even where the circumstances are such as might otherwise afford sufficient grounds for successful attack collaterally upon a judgment or decree, the conduct of a party may be such as to estop him from availing himself of those grounds. The general rule has been laid down and is supported by numerous decisions, that a party at whose instance a judgment was rendered is not entitled in a collateral proceeding to contend that the judgment is invalid. The reason or principle on which these decisions rest is not technically the doctrine of estoppel in the ordinary signification and acceptance of the term, but the principle that a person, having invoked the jurisdiction of a court and submitted himself thereto, cannot be heard thereafter, in a collateral proceeding, to question the jurisdiction so invoked. . . .

Thus plaintiff by its own conduct is precluded from assailing the judgment rendered in a proceeding which it initiated but neglected to prosecute.

We turn now to Court No. 71–10–01251 which presents an almost identical fact pattern. That action relates to entry 10129–H which was liquidated at Houston on July 12, 1962. Plaintiff's request, per letter of January 11, 1963, for reliquidation of the entry was denied on January 15, 1963. Plaintiff protested the collector's refusal on February 18, 1963, setting forth the same grounds stated in protest No. 63/12071. The protest was reviewed and denied on June 17, 1963 and was forwarded with the entry papers to the court where it was assigned No. 63/12056.

The Calendar Card therein shows that this protest 63/12056 was handled in identical fashion to protest No. 63/12071 and was finally dismissed for lack of prosecution, with the appearance of plaintiff noted, by court order entered on September 3, 1973.[11]

On January 18, 1971, the district director of customs at Houston refused to liquidate, or reliquidate, entry 10129–H pursuant to plaintiff's request of October 8, 1970. Protest No. 5301–1000115, setting forth the same grounds stated in protest No. 5301–1000114, was filed at Houston on April 10, 1971 and denied on April 12, 1971.

For the reasons previously indicated, the court reaches the same conclusion with respect to Court No. 71–10–01251 as it did in connection with Court No. 71–10–01250.

Plaintiff's motion for summary judgment in this consolidated action is denied, defendant's cross-motion for summary judgment is granted, and the action is dismissed.

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[11] The data here set forth with respect to protest Nos. 63/12071 and 63/12056 were obtained from the original files.

(C.D. 4664)

ROCKWELL IMPORT CORPORATION *v.* UNITED STATES

Gianduja coatings

SWEETENED CHOCOLATE—HAZELNUT BUTTER—FLAVORING AGENT

Merchandise described on the invoices as Gianduja Sweet Chocolate Coating, exported from Switzerland, and classified in liquidation upon entry at New York under TSUS item 156.47 as confectioners' coatings, *Held*, properly classifiable as claimed by the importer under TSUS item 156.25 as sweetened chocolate in bars or blocks weighing 10 pounds or more where the evidence establishes that the ingredients utilized in the manufacture of the coatings, with the exception of hazelnut butter, identify more readily with those specified in the statutory definition of chocolate than with the standards for confectioners' coatings, and the hazelnut butter, added as a flavoring agent as permitted by the chocolate definition, is in liquid form and intermixes with and disperses throughout the other ingredients to flavor the mixture.

Court Nos. 66/36518, etc.

Port of New York

[Judgment for plaintiff.]

(Decided June 28, 1976)

Busby Rivkin Sherman Levy and Rehm (*Joseph S. Kaplan* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Steven P. Florsheim* and *Sidney N. Weiss*, trial attorneys), for the defendant.

RICHARDSON, Judge: The merchandise in this case, described on the invoices as Gianduja Sweet Chocolate Coating, was manufactured in Neuchatel, Switzerland, and exported therefrom between September, 1963, and January, 1966, in 66-pound blocks. Upon entry at the port of New York, the merchandise was classified in liquidation under item 156.47, TSUS, as confectioners' coatings and other products (except confectionery) at the duty rate of 5 *per centum ad valorem*.

Plaintiff claims that the merchandise should be classified under item 156.25, TSUS, as sweetened chocolate in bars or blocks weighing over 10 pounds each at the duty rate of 0.8¢ per pound. Defendant claims that the merchandise was properly classified under item 156.47. Alternatively, defendant claims, on the basis of the evidence, that the merchandise should be classified first under item 157.10, TSUS, as candy, and other confectionery, not specially provided for at the duty

rate of 14 *per centum ad valorem*, and secondly, under item 182.91, TSUS, as edible preparations not specially provided for, other than gelatin, at the duty rate of 20 *per centum ad valorem*.

The record shows that the merchandise was manufactured by Chocolat Suchard S. A., a Swiss company in the business of manufacturing chocolate, confectionery and cocoa powder, in accordance with a batch formula known as Formula No. 856 (exhibit 1). The ingredients called for by Formula 856 are:

Chocolate liquor	19.875	percent
Sugar Powder	40.601	"
Hazelnut-butter	33.219	"
Cocoa-butter	5.962	"
Lecithin	0.341	"
Vanillin	0.002	"

Robert Tanner, now director of all production at Suchard's factory, and the sole witness at the trial, testified that he was responsible for production of the imported merchandise as Suchard's director of chocolate production at that time. Addressing himself to Formula 856 which he stated he prepared, he testified that chocolate liquor is the whole cocoa bean refined after shelling and roasting, and consists of about 50 to 58% cocoa butter, the balance being cocoa powder, that sugar powder is beet or cane commercial sugar, and that hazelnut butter is a liquid paste which is the result of grinding cleaned and roasted hazelnuts, and as to which nothing is added or subtracted. The witness stated that cocoa butter is added to certain formulae for the production of chocolate since many chocolate formulae, including Formula 856, call for an amount of cocoa butter in excess of what is contained in the chocolate liquor, that lecithin is an emulsifier which makes the chocolate more liquid, and that vanillin is an artificial flavoring.

When asked as to why hazelnut butter is introduced to the formulae, Mr. Tanner stated "To give the chocolate a hazelnut flavor" (R. 34), mentioning also that the butter has been refined to a point where no solid particles could be felt by the human tongue.

Mr. Tanner testified that Formula 856 contained at least 6.8% non-fat solids of the cocoa bean nib, but did not contain any vegetable fat, because the hazelnut butter, which he had previously testified contains 60 to 65% hazelnut oil, was added as flavoring and not as fat. He stated that a product produced under Formula 856 would not be known in the trade as a confectioners' coating because cocoa butter and hazelnut oil are too expensive to be used in such coatings. And in this connection, commenting on p. 215 of Russell Cook's book *Chocolate Production and Use*, New York (1963), he stated that he

agreed with the author's distinction between "regular chocolate" and "confectioners' coatings", namely, that in confectioners' coatings, cocoa powder is substituted for chocolate liquor, and vegetable fats having a higher melting point than cocoa butter are used. He pointed out that hazelnut oil has a melting point of 0°C. while cocoa butter melts at 33°C.

When asked to explain why hazelnut flavoring elements are required to the extent of 33%, the witness testified (R. 67): "The hazelnut flavor is not a strong flavor as coffee or orange oil, And to get a good quality, you have to add this amount. If not, you don't have a hazelnut flavor in your chocolate, but a chocolate flavor." Exhibit 2, said to be a sample jar of hazelnut butter (as used in Formula 856) taken from a production batch, is in liquid form.

The witness did not consider Gianduja chocolate to be either candy or confectionery because candy and confectionery are small pieces ready to be eaten, and Gianduja chocolate as exported to the United States are big slabs of approximately 60 pounds. The witness had previously stated that Gianduja chocolate, which is said to mean "hazelnut chocolate", is remelted by the customer.

Plaintiff contends that the imported merchandise falls within the language of item 156.25 and not item 156.47. Plaintiff argues (brief, p. 16):

> . . . An examination of Exhibit 1 shows, however, that whatever the percentage of oil in the hazelnut butter, it is not differentiated in the mass—the flavoring material is hazelnut butter. . . .

Defendant contends that the merchandise at bar is not a chocolate within the ambit of item 156.25. Defendant argues (brief, p. 15):

> . . . plaintiff lists hazelnut butter, which comprises over 33 percent of the merchandise, as a flavoring. It is defendant's contention that hazelnut butter is nothing more or less than ground hazelnuts.

Defendant goes on to state that since the merchandise contains a substantial amount of nuts it cannot be classified as chocolate but must be classified as a confectionery product.

Each party also contends that the provision it relies on is more specific than the other, as between item 156.25 and item 156.47.

The presence of hazelnut butter in Formula 856 also leads defendant to contend in the alternative, first, that the imported merchandise if not confectioners' coating, should be classified under item 157.10 as candy, and other confectionery, not specially provided for. Defendant argues (brief, p. 26):

> . . . Since, in the instant case, the undisputed facts are that the merchandise is 33% chopped hazelnuts by weight, the merchandise should be classified under item 157.10.

And defendant's second alternative claim is that the imported merchandise, if not a confectioners' coating or candy or confectionery, is an edible preparation within the meaning of item 182.91, contending that the record is clear that it is an edible preparation and that it is not chocolate for tariff purposes.

Disposition of the instant controversy appears to hinge on the effect of the presence of hazelnut butter in the Formula 856 coating in issue. Chocolate is limited to products (whether or not confectionery) consisting wholly of ground cocoa beans, with or without added fat, sweetening, milk, flavoring, or emulsifying agents. *Headnote 1, Part 10B, TSUS Schedule 1.* Confectioners' coatings are products, except confectionery, containing by weight not less than 6.8% non-fat solids of the cocoa bean nib and not less than 15% of vegetable fats other than cocoa butter. *Item 156.47, TSUS.* The chocolate provision identifies all of the ingredients which can be included in a product contending for classification as a chocolate. The confectioners' coating provision only identifies two of the ingredients which are prerequisite to classification of a product as a confectioners' coating, and as to those two ingredients minimum amounts are specified. As to the two provisions the court is of the opinion that the chocolate provision is the more specific provision and the more difficult to satisfy. It has no open-ended language as in the case of the confectioners' coating provision.

The evidence indicates that confectioners' coatings are generally made with cheaper ingredients that those used in the production of chocolate, namely, cocoa powder is substituted for chocolate liquor, and vegetable fats other than cocoa butter are used. And corroboration of this evidence is reflected in the findings of the Tariff Commission. See *Summaries of Trade and Tariff Information* (1969), Schedule 1, Vol. 9, pp. 71–72. As for the ingredients in the imported merchandise, with the exception of the hazelnut butter, they are associated more readily with the production of chocolate rather than with the production of confectioners' coatings. And the only question is whether the presence of hazelnut butter in the formula under which it is made makes a difference.

The presence of nuts in the composition of imported merchandise said to be chocolate has led to repeated rejection of claims for classification of such merchandise under sweetened chocolate provisions of predecessor Tariff Acts. (*C. J. Van Houten & Zoon, Inc., Bluefries New York, Inc.* v. *United States*, 48 CCPA 116, C.A.D. 775 (1961) and the cases cited on page 120. In all of these cases the courts were dealing with the presence of *solids* in the alleged chocolate.

In C.A.D. 775 it was noted by our appellate court that crushed hazelnuts were considered not to be merely flavoring. In this connec-

tion, this court stated in that case (44 Cust. Ct. 223, C.D. 2178 (1960) at page 229):

> Flavoring is a substance used to impart flavor to the article to which it is added. To accomplish this result, the flavoring substance would have to be in a form in which it could permeate the article being flavored and thus impart the desired flavor to the whole. It is difficult to see how the chopped nuts in this case could penetrate and flavor the chocolate used in producing the instant bars in the sense that the orange oil, for example, flavors the chocolate in the bar labeled "Orange Milk Chocolate" in plaintiffs' collective exhibit 2, or, for that matter, the lecithin or vanillin flavors the chocolate in the bars in issue. It is clear from an examination of the illustrative sample that the separate identity of the chopped nuts has been preserved and that they constitute an independent substance with an independent flavor. They impart to the bar a texture distinctively different from the others in the exhibit and are not a mere flavoring agent.

The posture of the courts with respect to nuts and as to flavoring *vis-a-vis* chocolate under predecessor Tariff Acts has been preserved under the TSUS. *Tariff Classification Study*, Schedule 1, page 163. However, in the only case involving the chocolate issue decided under TSUS thus far, namely, *Border Brokerage Co., Inc.* v. *United States*, 62 Cust. Ct. 624, C.D. 3836 (1969) involving the usage of coconut oil in the chocolate formula, the issue of the propriety of a nut product as a flavoring agent was left open. The court in C.D. 3836 did, however, conclude expressly with respect to the ingredient fat (and by necessary implication with respect to the other enumerated ingredients permitted to be added to chocolate for classification purposes) that quantitative restrictions on the statutorily specified ingredients are nonexistent under the TSUS. Indeed, it is difficult to perceive of how the *de minimis* rule could apply to the statutory definition of chocolate under the TSUS as to the named ingredients without being self-defeating of the chocolate standard.

In this case counsel for the Government has referred to the hazelnut butter in the brief as "ground hazelnuts" and "chopped hazelnuts" with the obvious connotation of a solid. And if this was indeed the case here under the evidence of record the court would have no difficulty in disposing of the issue in the manner contended for by the Government consistent with judicial precedent noted herein. But the uncontroverted evidence before the court establishes without question that the hazelnut ingredient added to Formula 856 is a *liquid*. It is well settled that a component material must be considered in its condition when it enters the article in question and not at any other time when its name and nature are different. *United States* v. *Veit, Son*

& Co., 8 Ct. Cust. Appls. 290, 294, T.D. 37540 (1918). And in this context it is clear that although *grinding* and *chopping* may have been the processes by which hazelnuts were prepared for usage in Formula 856, it is equally clear that in the condition the resulting product enters into the formula, it can no longer be regarded as hazelnuts anymore than say, peanut butter, can be regarded as peanuts.

In liquid form the hazelnut butter obviously intermixes with the other ingredients in Formula 856 and disperses itself throughout the mixture. After that, if it manifests itself at all in the mixture it would have to be in the taste inasmuch as no trace of its remains otherwise cognizable by the human senses as would be the case with the chopped hazelnuts in the chocolate bars in C.D. 2178. The evidence at bar establishes that the hazelnut butter was expressly added as a flavoring agent. And although not done in this case, the Tariff Commission reports that chocolate, with nuts ground sufficiently fine so as not to be observable in the chocolate, has generally been classified as sweetened chocolate under item 156.30 (the provision for forms of sweetened chocolate other than bars or blocks of 10 pounds or more). *Summaries of Tariff and Trade Information* (1969), Schedule 1, Vol. 9, page 84.

Under the evidence presented in this case the court is compelled to conclude that the hazelnut butter in Formula 856 is a flavoring agent, that its presence in the formula is consistent with the statutory definition of chocolate in issue here, and that the imported merchandise should, therefore, be classified under item 156.25 as a chocolate and not under item 156.47 as a confectioners' coating. Further, inasmuch as the imported chocolate was prepared for usage as a coating and exported in bulk quantities, it must be regarded as a *producer's* commodity, and as such, would not seem to respond to the designation "candy" under item 157.10, which covers a *consumer's* article. The coatings at bar undoubtedly will be utilized in the manufacture of candy, among other things. But as imported the coatings do not come within the ambit of the term "candy" as that term is commonly understood. And the court does not reach the question of whether the imported chocolate is classifiable under item 182.91 as an edible preparation since this provision is at best residual.

For the reasons stated plaintiff's claim for classification of the imported merchandise as sweetened chocolate under item 156.25 is sustained, and defendant's alternative claims for classification of the subject merchandise under item 157.10 or 182.91 are overruled.

Judgement will be entered accordingly.

(C.D. 4665)

AIR-SEA FORWARDERS, INC. *v.* UNITED STATES

Inspection lights

FLASHLIGHT—COMMON MEANING—*EO NOMINE* DESIGNATION

Articles consisting of plastic battery and switch case and metal cap with gooseneck extension and lamp socket, imported at Los Angeles-Long Beach, California from Japan and classified in liquidation under TSUS item 683.70 as flashlights, *Held*, not classifiable under TSUS item 683.80 as other portable electric lamps as claimed where the evidence establishes that after importation the articles are assembled, equipped with a lens-end type bulb, and sold to purchasers who supply "C" type batteries (two per case) and use them as inspection lights in small, inaccessible areas, and are within the broad, nonuse oriented common meaning of the term "flashlight", which is, a small, battery-operated, portable electric light, and are *eo nomine* provided for in item 683.70.

Court No. 73-8-02256

Port of Los Angeles

[Dismissed.]

(Decided June 29, 1976)

Glad, Tuttle & White (*Robert Glenn White* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Andrew P. Vance* and *Jerry P. Wiskin*, trial attorneys), for the defendant.

RICHARDSON, Judge: The merchandise in this case, described on the invoice as flexible neck inspection lights, was exported from Japan in December, 1971, entered at the port of Los Angeles-Long Beach, California, and classified in liquidation under TSUS item 683.70 as flashlights at the duty rate of 35 *per centum ad valorem*. Plaintiff claims that the lights should be classified under TSUS item 683.80 as other portable electric lamps with self-contained electrical source at the duty rate of 13.75 *per centum ad valorem*.

The imported article consists of two parts, (1) a cylindrical plastic case measuring about 3½ inches high and 1⅝ inches in diameter at the top and 1⅛ inches in diameter at the bottom, to the exterior surface of which an off-on slide switch is mounted, and (2) a tapered cylindrical metal cap measuring about 1¼ inches high from which protrudes a 5¼ inch long metal gooseneck extension at the end of which is affixed a metal lamp socket. The case is grey, the switch red, and the cap-extension-socket assembly is chrome colored. The mating ends of

the case and cap are threaded as also is the upper end of the lamp socket. After importation the article is equipped and marketed with a GE 222 lens-end bulb and it is operated with two "C" type batteries which the purchaser supplies.

Robert L. Weible, vice president and general manager of Aqua Dynamics, Inc., manufacturer and distributor of products for the marine, recreational vehicle, and industrial fields, testified that he was responsible for purchasing the article in issue, and for its sale and distribution after assembly and packaging. As to the usage the witness testified (R. 9–10):

> Q. Have you ever seen Plaintiff's Exhibit 1 in use?—A. Yes, I have.
>
> Q. What were those instances in which you have seen it in use?—A. The primary usage has been in our own facility, being that we have three companies and we are in the manufacturing business of various different types of products. The primary usage has been for inspecting inaccessible areas. For example, cylinders which have small ports, whereby the only way that you can inspect the internal diameter or internal surfaces of the cylinders is by inserting the small neck of the inspection light into the inside of the cylinder, and with the diffused light you can then inspect the inside surfaces of the area.

The witness stated that the imported article was sold as an inspection light.

Mr. Weible also testified that he agreed with the definition of the term "flashlight" which is contained in *Webster's New International Dictionary*, the unabridged edition (1949), at page 257 (said by counsel to be the same as the 1966 edition) as follows: "Flashlight: a small battery operated portable electric light." He distinguished the functions of a flashlight from that of the imported inspection light as follows (R. 51):

> The function of a flashlight, as I would define it, would be as I stated, to direct a beam of light at something, at some distance away from you, in order to see the object.
>
> This item, the Flex-O-Flash, I would say was designed to obtain light in an enclosed general area.

Fowler L. White, a foreman with Aqua Dynamics in 1972, testified as to on-the-job usage of the imported article as follows (R. 55–56):

> Q. What was the use to which you put it?—A. Well, we make an antenna, a marine type, and it consists of a 23-inch disk in which we place a dome. We have a dome that goes on top of it, and through this dome we have a stanchion, and you also have to have a coax' coming up from the Masonite disk to the dome, and this particular coax' has to clear the stanchion when you put it in. And this is an ideal light for us to go in and put it in the hole.

It's a one-eighth inch hole in the dome, and we can go in there and with a diffused light in there you can see which way this coax' runs, and it has to clear the stanchion.

The witness further testified that a flashlight, which he considered to be a hand-held object flashing a beam of light, could not be used for this purpose.

This is the substance of testimony offered on plaintiff's behalf. Defendant called four witnesses to give testimony in the case.

Robert E. Brindley, world-wide product director of flashlights and lanterns for Union Carbide Eastern, testified that he had designed "Just about all the flashlights that Union Carbide manufactures under the Eveready brand here in the U.S.A." (R. 60). With respect to the imported article he testified (R. 95–96):

Q. Mr. Brindley, what do you consider Plaintiff's Exhibit 1 to be—A. A flashlight.

Q. Please tell us why?—A. It performs basically the same function as all of the flashlights that I have ever seen.

Q. Mr. Brindley, based on your knowledge and experience, would Plaintiff's Exhibit 1 be considered to be a flashlight in the trade?—A. Yes.

Q. Why?—A. Because it's a hand-held battery operated device that illuminates.

The witness also stated that he agreed with Webster's definition of a flashlight which was read to the witness Weible, and that the imported article, called Flex-O-Flash, falls within that definition and that it is an inspection light. The witness stated that devices like the imported article are not new to the trade. And he testified concerning Union Carbide devices of this class and kind called flashlights with flexible extensions which placed a light source away from the case by means of a flexible member going back to 1940.

Harry E. Douglass, president of H. E. Douglass Engineering Sales Company, representative and distributor of electrical lighting and flashlights, among other things, testified that his company distributes a flashlight similar to the imported article (received in evidence as exhibit G) on behalf of Stewart R. Browne Manufacturing Company, for whom he formerly worked which he sells as a flashlight with an extended probe. Comparing the two the witness testified (R. 173):

Q. Mr. Douglass, are the W.O.L.F., Exhibit G, and the Flex-O-Flash, Exhibit 1, identical or different in function?—A. They are both flashlights operated in the same manner.

The witness considered exhibit G to be an inspection light and also a flashlight. He stated that he agreed with Webster's definition (of the term flashlight) which he heard read in court, and that in his opinion the imported article is a flashlight because it is a battery driven device

with a bulb screwed in the end of a shaft to either see what you are doing or where you are going.

Florence Irwin, owner and operator of an aircraft parts business called Aircraft Spruce and Specialty Company, testified that she sells the imported article which she purchases from Aqua Dynamics mainly through mail-order catalogs. She stated that it is sold as an inspection light primarily to aircraft builders and shop mechanics, and that she considers it to be a flashlight. In her catalog (exhibit I, p. 127) the imported article is described as "Handy gooseneck flashlight for mechanics in every field."

Fred Newton, corporate vice president and branch manager of Hurley Electronics, Inc., suppliers of radio and television repair parts, components and tools, testified that his company sells the imported article, which he identifies as Flex-O-Flash and which is purchased from Aqua Dynamics, to its repair customers. Asked as to how his company sells the imported article, the witness answered (R. 208–209):

> A. Well, if anybody has ever seen the inside of a television set they know that there are components, behind components, so in order to identify them without removing the entire unit sometimes it's convenient to be able to go around a corner with a light and illuminate the object.

Mr. Newton said that he considered the imported article to be a flashlight with a gooseneck.

Plaintiff contends that the imported article is not a flashlight because the common understanding of a flashlight is that it possesses a design function namely, a reflector, giving it a capacity of projecting a directed beam of light, a facility which the imported inspection light lacks. Defendant contends that the imported merchandise falls within the common meaning of the term flashlight.

The court agrees with defendant in this case. The imported article is a flashlight within the meaning of item 683.70, in the opinion of the court. *Webster's Third New International Dictionary* (1961), contemporaneous with the promulgation of the TSUS, defines the term flashlight as "a small battery-operated portable electric light." This definition, cited approvingly by this court in *Biddle Purchasing Co.* v. *United States*, 48 Cust. Ct. 251, 257, C.D. 2345 (1962), *aff'd*, 50 CCPA 71, C.A.D. 823 (1963), is expressive of the common meaning of the term flashlight. And it is to be noted that this definition is broad based, and is not circumscribed by usage or any physical devices as would influence usage. Hence, as the evidence in this record demonstrates, a wide variety of articles are bought, sold, and known as flashlights.

With respect to the article in issue, there can be no doubt but that it fits comfortably within the ambit of the definition. It is small,

battery-operated ,and portable, and is, *a fortiori*, an electric light. The fact that the imported article is also known specifically as an inspection light does not change its character as a flashlight. This description only serves to emphasize its adaptation to a specific use, as is the case with other types of flashlights. It is, nevertheless, a *species* of flashlight. And the instant record makes abundantly clear the fact that within the trade and commerce of the United States the imported article and other articles of this class and kind are marketed as, and considered to be, inspection flashlights.

Moreover, the court can find no rational basis for differentiating between the imported article and the *genus* flashlight in terms of a reflector, as plaintiff is disposed to do. Modern technology has found a way to utilize the lamp or bulb to concentrate the emitted light and project a beam of light via a lens if that be desirable, and thereby obviate the use of a reflector which accomplishes the same result. This achievement has undoubtedly contributed to the reduction in size of flashlights (as witness the small penlite type of flashlight) and, as in this case, the extension of the light source beyond the battery case to attain a more diversified and specialized use of the flashlight. But in the court's view, nothing has emerged from this change which suggests a different nomenclature for articles featuring it. It is well settled in customs jurisprudence that an *eo nomine* designation will cover all forms of an article. *T. M. Duche & Sons, Inc., et al.* v. *United States*, 44 CCPA 60, C.A.D. 638 (1957); *Crosse & Blackwell Co.* v. *United States*, 36 CCPA 33, C.A.D. 393 (1948); *Nootka Packing Co. et al.* v. *United States*, 22 CCPA 464, T.D. 47464 (1935). And this principle is applicable to the facts in the instant case.

For the reasons stated the district director was correct in classifying the imported article as a flashlight, and plaintiff has failed to sustain the issuable allegations in the complaint. Judgment will be entered herein accordingly.

(C.R.D. 76–1)

WAY DISTRIBUTORS, INC. *v.* UNITED STATES

Motion to compel disclosure

Court Nos. 73–4–00943 and 75–7–01812

Port of Boston

[Plaintiff's motion granted in part.]

(Dated March 8, 1976)

Doherty & Melahn (*William E. Melahn* of counsel) for the plaintiff.
Rex E. Lee, Assistant Attorney General (*Jerry P. Wiskin*, trial attorney), for the defendant.

MEMORANDUM OPINION AND ORDER

WATSON, Judge: Plaintiff has moved to compel disclosure of certain information it requested of defendant.

In the present posture of this case a request for the names and positions of the people involved in the "formulation" of ORR Ruling 202–71 (which resulted in the disputed classification) and for a statement of their activity in connection with the ruling as well as the identification of written material they consulted is not objectionable.

The reasonable probability that the requested information will yield evidence related to plaintiff's claim that this ruling was a "rule" issued in violation of the Administrative Procedure Act, 5 USC § 551 et seq. is more compelling than the defendant's objections. The objections are made not so much to the identifying information requested as to the likelihood this will lead to objectionable inquiries into the mental processes, opinions and communications of these persons. That problem can be met if and when it arises.

For the moment, the inquiries appear reasonably calculated to yield evidence on the nature of ORR Ruling 202–71 and the issue

of compliance with the Administrative Procedure Act without requiring the disclosure of objectionable material.

Defendant having supplied a copy of ORR Ruling 202–71 and the letter of June 3, 1970, that portion of the motion to compel has been rendered moot. The answer to interrogatory No. 5(a) is adequate, and no reason to compel a further answer has been justified.

For the above reasons, it is

ORDERED that plaintiff's motion to compel disclosure with respect to interrogatories 1, 2, 3 and 4 of its second set of interrogatories directed to defendant be, and the same hereby is, granted.

As to all other matters plaintiff's motion is denied.

(C.R.D. 76–2)

S.G.B. STEEL SCAFFOLDING AND SHORING CO., INC. *v.* UNITED STATES

Opinion and Order on Plaintiff's Motion for Summary Judgment

Court Nos. 72–2–00394 and 73–6–01355

Port of New York

[Motion denied.]

(Dated March 22, 1976)

Siegel, Mandell & Davidson (*Stephen M. Zelman* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Ira J. Grossman*, trial attorney), for the defendant.

NEWMAN, Judge: This action is before the court on plaintiff's motion for summary judgment under rule 8.2. Defendant opposes the motion on the ground that there exists a material issue of fact that requires resolution by a trial.

The record in *S.G.B. Steel Scaffolding & Shoring Co., Inc.* v. *United States*, 70 Cust. Ct. 158, C.D. 4423, 361 F. Supp. 631 (1973), has been incorporated pursuant to plaintiff's motion. Additionally, both parties have submitted affidavits: Plaintiff's affidavit by Richard J. Hlavac, chief engineer of S.G.B. Universal Co., Inc; defendant's affidavit by Albert A. Lotters, a consulting structural engineer with the General Services Administration.

Predicated upon a study of the incorporated record and the affidavits submitted by the parties, I have concluded that there exists a genuine issue as to a material fact for trial. Accordingly, plaintiff's motion is denied.

The issue for determination concerns the proper tariff classification of so-called "shore frame systems" imported from Great Britain during 1970 and 1971 at the port of New York. Such systems comprise a number of structural components which are assembled and used at a construction site of a building for temporarily supporting concrete formwork into which a reinforced concrete slab is poured. After the concrete slab has acquired sufficient strength to carry its own load, the formwork and the supporting shore frame system are lowered and removed from the job site for use again where another concrete slab is to be poured. There is no dispute that the shore frame systems in the present case are similar in all material respects to those which were the subject of the prior *S.G.B.* case (the record of which has been incorporated).

Here, the shore frame systems were classified by the regional commissioner of customs under item 657.20 of the Tariff Schedules of the United States, as modified by T.D. 68–9, and assessed with duty at the rate of 13 or 11 per centum ad valorem, depending upon the date of entry. Plaintiff claims that the merchandise is properly dutiable under item 652.98, TSUS, at the rate of 9.5 per centum ad valorem. The pertinent statutory provisions are:

Classified under:		
	Articles of iron or steel, not coated or plated with precious metal:	
	* * * * * * *	
	Other articles:	
	* * * * * * *	
657.20	Other	13% or 11% ad val. [depending on date of entry]

Claimed under:		
	Hangars and other buildings, bridges, bridge sections, lock-gates, towers, lattice masts, roofs, roofing frameworks, door and window frames, shutters, balustrades, columns, pillars, and posts, and other structures and parts of structures, all the foregoing of base metal:	
	* * * * * * *	
652.98	Other	9.5% ad val.

Plaintiff contends that as a matter of law the imports are classifiable as "other structures and parts of structures" within the purview of the superior heading to items 652.90–652.98, and are properly dutiable

under the basket provision, item 652.98. Defendant, on the other hand, argues that a material question of fact exists as to whether shore frame systems are "structures" in a commercial sense, viz., in the construction industry.

Since the merchandise was classified under the "basket" provision for metal articles which are not more specifically provided for elsewhere in the tariff schedules, the sole issue on the merits is whether the shore frame systems are specifically provided for in item 652.98. Thus, the fundamental inquiry is the determination of the meaning of "structures" at the time TSUS item 652.98 was enacted. Significantly, the Court of Customs and Patent Appeals, in determining the meaning of the term "Christmas-tree lamps" in item 686.30, very recently held: "In determining such meaning, it is to be kept in mind that in a tariff statute Congress ordinarily employs terms in their commercial sense". *Esco Manufacturing Co., aka J. Hofert Co.* v. *United States*, 63 CCPA71, C.A.D. 1167, 530 F. 2d 979 (1976). And even though testimony does not prove a commercial designation of a term which differs from its common meaning, if as here, the common meaning of a term is indefinite,[1] it is proper for the court to consider the interpretation commonly placed upon it by the particular industry involved. *United States* v. *Colonial Commerce Co., Ltd., P. John Hanrahan, Inc.*, 44 CCPA 18, C.A.D. 629 (1956). See also *United States* v. *National Silver Co.*, 59 CCPA 64, C.A.D. 1040, 455 F. 2d 593 (1972); and *Atlantic Aluminum & Metal Distributors, Inc.* v. *United States*, 47 CCPA 88, C.A.D. 735 (1960).

In the prior *S.G.B.* case, the shore frame systems were classified under item 657.20, TSUS, and were claimed by plaintiff to be dutiable under item 664.10 as jacks or lifting machinery or parts thereof. The court overruled plaintiff's claim, and did not decide the present question of whether the shore frame systems were classifiable under item 652.98.[2] In the present case, plaintiff has incorporated the record in the prior *S.G.B.* case, and relies upon certain references therein to shore frame systems as "structures". Additionally, plaintiff relies upon the affidavit of Mr. Hlavac stating, *inter alia*, that in his work as an engineer he frequently heard a shore frame system referred to as a "structure" and as a "shore tower".

[1] For example, plaintiff cites *Webster's Third New International Dictionary of the English Language* (1968), which defines "structure" as follows: "2(b) something made up of more or less interdependent elements or parts; something having a definite or fixed pattern or organization". While conceding that the foregoing definition embraces shore frame systems, defendant insists that the definition is "so broad as to be virtually meaningless". Thus, defendant observes that such definition could also apply to such diverse things as the human anatomy, ball-point pens, corporations, and governmental organizations.

[2] The court did, however, note in dictum that the superior heading to items 652.90-652.98 and heading 73.21 of the Brussels Nomenclature contain "substantially similar language", and that the Brussels provision is intended to encompass adjustable or telescopic props and similar equipment used in scaffolding. 70 Cust. Ct. at 165.

In opposition to plaintiff's motion, defendant has submitted Mr. Lotters' affidavit stating, *inter alia*, that in his entire career as a structural engineer, which dated back to 1935, he "never heard a shore referred to as a structure"; and further, in the field of structural engineering, the term "structure" is not applied to shoring used as temporary supports during construction projects.

In sum, testimony establishing whether or not at the time of the enactment of the tariff schedules the term "structure" in its commercial sense applied to shore frame systems is clearly germane. Plainly, on this point the affidavits of the parties are sharply conflicting. Under these circumstances, I am persuaded that there exists a genuine issue as to a material fact requiring a trial, as urged by defendant, and therefore plaintiff's motion for summary judgment is denied.

(C.R.D. 76-3)

GEHRIG, HOBAN & CO., INC. *v.* UNITED STATES

Opinion and Order on Defendant's Motion for Sanctions

Court No. R68/17303

[Motion granted.]

(Dated June 18, 1976)

Busby Rivkin Sherman Levy and Rehm **(*Saul L. Sherman* of counsel) for the plaintiff.**

Rex E. Lee, **Assistant Attorney General (*Glenn E. Harris, Max F. Schutzman, Edmund F. Schmidt,* trial attorneys), for the defendant.**

NEWMAN, Judge: Defendant has filed a motion for sanctions pursuant to the provisions of rule 6.5(b)(2). The predicate of defendant's motion is that plaintiff has not complied with this court's order of December 1, 1975 compelling discovery, in that plaintiff failed to answer certain propounded interrogatories.

For the reasons stated, defendant's motion for sanctions is granted, as herein provided.

The background of these unduly protracted proceedings may be summarized as follows:

This is an appeal for reappraisement filed in 1968 contesting the Government's appraisements of certain "Eleroda" machine tools, parts thereof and accessories. The merchandise was exported in 1962 from Switzerland by Ateliers des Charmilles S.A. Geneve ("Charmilles") and imported by plaintiff, a customhouse broker at the port

of New York, for the account of Charmilles Corporation of America ("Charcoram"), a wholly-owned subsidiary of the exporter.

Issue was joined on September 20, 1973. The pleadings indicate that the merchandise was appraised on the basis of United States value, pursuant to section 402(c) of the Tariff Act of 1930, as amended. Plaintiff claims that the proper basis for appraisement is export value, as defined in section 402(b), as amended; or in the alternative, United States value, pursuant to section 402(c), as amended; or alternatively, constructed value, under section 402(d), as amended.

It appears that on December 24, 1974 defendant served interrogatories directed to plaintiff pursuant to rule 6.3. Despite and during several extensions of time granted by defendant to plaintiff within which to respond to the interrogatories,* plaintiff failed to answer or object as required by rule 6.3(a). On July 1, 1975 (which was more than 6 months after service of the interrogatories), defendant moved pursuant to rule 6.5 for an order compelling plaintiff to answer said interrogatories. On July 9, 1975, a conference was held in chambers pursuant to plaintiff's request concerning the discovery proceedings and proposals by plaintiff for disposition of this and other related cases. On July 18, 1975, plaintiff moved for an order extending its time to September 15, 1975 in which to answer defendant's motion to compel discovery. This latter extension of time was granted over defendant's objections by an order dated July 29, 1975. On September 15, 1975, plaintiff filed a partial opposition to defendant's motion to compel discovery, raising for the first time objections to certain interrogatories; and thereafter defendant filed a reply to the aforesaid opposition on November 14, 1975. On December 1, 1975, this court granted defendant's motion to compel discovery. Pursuant to said order of December 1, 1975, plaintiff was ordered to answer defendant's propounded interrogatories within 60 days. Additionally, the order directed that:

> * * * should plaintiff not fully comply with this Court's order, then plaintiff shall be precluded from either introducing at trial of the issues in this action, or presenting in conjunction with the filing of a dispositive motion herein, any evidence concerning the information sought to be elicited by defendant's interrogatories.

It further appears from the within moving papers that on January 30, 1976, defendant received plaintiff's answers to the propounded interrogatories. The present motion for sanctions pursuant to rule 6.5 (b)(2) was filed on April 29, 1976, based on the assertion that plaintiff has not complied with this court's aforesaid order of December 1, 1975 compelling discovery, in that plaintiff failed to

*These extensions are disclosed in defendant's motion to compel discovery filed with the court on July 1, 1975. Such extensions added a period of almost 4 months to the original 60 days within which plaintiff had to respond to the interrogatories.

answer interrogatories numbered 20(c), 24(a), (c), (g) and (h), and interrogatories 27(b) through 27(f). On May 14, 1976, plaintiff filed a motion for an extension of time to June 1, 1976 in which to answer defendant's motion. The extension was granted. On June 1, 1976, plaintiff filed a memorandum in opposition to defendant's motion for sanctions.

The specific interrogatories and answers thereto in dispute are set forth below:

Interrogatory 20:

(c) Describe the merchandising operations of Charmilles with respect to sales of the Eleroda machine in (1) Switzerland and (2), all countries other than the United States, including, in your response, the identity of any distributorships, agencies, branches, or other entities which deal with the Eleroda machine.

Answer:

(c) This question should be addressed to Ateliers de Charmilles S. A. Plaintiff cannot give an adequate answer.

Interrogatory 24:

(a) Identify all advertising, service, and warranty costs incurred by Charmilles with respect to the Eleroda machines outside of the United States, including, in your response, the identity of such markets by country, and the time period applicable to such expenses.

Answer:

(a) This question can only be answered by Charmilles.

(c) Identify all written offers of the subject merchandise made by Charmilles, Charcoram, or any distributors.

Answer:

(c) Charcoram offered to supply merchandise only to distributors and only at the prices set forth on its prices lists, less the applicable discounts. Any offers made by Charmilles in other markets must be obtained from them * * * *.

(g) Identify all documents which reflect home market sales between the years 1961 and the present.

Answer:

(g) This question must be directed to Charmilles rather than to Charcoram, since it pertains to home market sales, presumably meaning sales in Switzerland. As for identification, all relevant files are maintained in Geneva. Charcoram has no detailed knowledge of pricing patterns in other markets except such as was already furnished to the government by previous counsel in the administrative phases of this case.

(h) Identify all sales expenses incurred with respect to the sale of the Eleroda machines in (1), the United States, (2), Switzerland and (3), all other countries, including, in your response, the identity of such countries, and the time period that such expenses were applicable.

Answer:

(h) Annexed as Exhibit 9 is a copy of the relevant portion of Charcoram's Profit and Loss statement for 1966, showing its selling expenses. Corresponding information as to sales in Switzerland and sales to third country purchasers are not available to Charcoram, except as set forth in the published financial statements of Charmilles, the relevant portion of which for the year 1966–67 is annexed hereto as Exhibit 10.

Interrogatory 27:

With respect to plaintiff's claim made under constructed value, please answer the following:

(b) Provide a detailed breakdown of plaintiff's claimed cost of materials, including all types of claimed expenses which plaintiff claims is included in this category.

(c) Provide a detailed breakdown of plaintiff's claimed cost of fabrication or other processing of any kind employed in producing such or similar merchandise, including all types of claimed expenses which plaintiff claims is included within this category.

(d) Provide a detailed breakdown claimed for the general expenses and profits, including all types of claimed expenses which plaintiff claims is included within this category.

(e) Provide a detailed breakdown of the claimed cost of all containers and coverings and all other expenses incidental to placing the merchandise undergoing appraisement in condition, packed ready for shipment to the United States.

(f) Identify all documents supporting your responses to interrogatories 27(b) through 27(e), *supra*.

Answer:

(b)(c)(d)(e)(f) This information must be obtained from Charmilles. Charcoram is not able to provide it.

Plaintiff, in response to defendant's motion for sanctions, now tardily objects to providing defendant with the requested information principally on the ground that Charcoram is a domestic subsidiary of a foreign corporation (Charmilles), and is not required to provide data in the possession, custody, and control of the foreign parent corporation. Plaintiff states, however, that the exporter "has volunteered to make relevant information available to defendant in Switzerland". Additionally, counsel for plaintiff states in a letter to the court dated May 20, 1976 that he has "just discovered that our files contain

a substantial amount of information which we had previously thought could only be obtained from Geneva".

Irrespective of the merits of plaintiff's present objections, such objections were not timely interposed by plaintiff in accordance with rule 6.3(a); nor did plaintiff make a timely application for a protective order, as provided by rule 6.1(c). An order compelling discovery having been entered on December 1, 1975, the only question now before the court is whether plaintiff has complied with that order. Plainly, the requested information has not been provided to defendant. Information which plaintiff must obtain from the exporter to support its claimed values should be made available to defendant, or plaintiff should be precluded from availing itself of such information at a trial or in support of a dispositive motion.

Finally, rule 6.5(b)(2)(ii) provides:

> **(b) Failure to Comply with Order:**
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> * * * * * * *
>
> (2) If any party or a person designated under Rule 7.3(b)(4) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under paragraph (a) of this rule, the court may make such orders in regard to the failure as are just, including, among others, the following:
>
> * * * * * * *
>
> (ii) an order refusing to allow the disobedient party to support or oppose designated claims or defenses, or prohibiting him from introducing designated matters in evidence;
>
> * * * * * * *

Under all the facts and circumstances, defendant's motion for sanctions under the foregoing rule should be granted unless plaintiff provides the requested information. Accordingly, it is hereby ORDERED:

Plaintiff shall be precluded from either introducing at trial of the issues in this action, or presenting in conjunction with the filing of a dispositive motion herein, any evidence concerning the information sought to be elicited by defendant's interrogatories 20(c), 24(a), (c), (g), and (h), and 27(b) through 27(f), unless plaintiff shall within 60 days of service of this opinion and order serve defendant with supplemental answers to said interrogatories fully providing the information requested thereby. The identification of the documents mentioned in said interrogatories shall not be required for such documents as plaintiff is willing to voluntarily produce for inspection and copying within the 60 days permitted herein for serving supplemental answers. Further, in the event such supplemental answers are served, or documents voluntarily produced for inspection and copying, within the 60-day period, plaintiff may move to vacate the sanctions hereby imposed.

(C.R.D. 76–4)

CREATIVE PLAYTHINGS, DIVISION OF CBS, INC. *v.* UNITED STATES

On Plaintiff's Motion for Leave to Amend Summons and Defendant's Cross-Motion to Sever and Dismiss as to Certain Entries

Court No. 73–11–03015

Port of New York

[Plaintiff's motion denied without prejudice; defendant's cross-motion denied.]

(Dated June 24, 1976)

Barnes, Richardson & Colburn (*Edward F. Christopher* of counsel) for the plaintiff.

Rex E. Lee, Assistant Attorney General (*Alan L. Langus*, trial attorney), for the defendant.

MALETZ, Judge: Plaintiff, alleging that its name was inadvertently abbreviated on the entry documents and that the error was followed on the summons filed in this action, has moved to amend the summons by changing the plaintiff's name thereon from "Creative Playthings" to "Creative Playthings, Division of CBS, Inc." Plaintiff asserts that this amendment will not prejudice defendant's rights "since Creative Playthings, Division of CBS, Inc. was at all times the actual plaintiff in this action."

Defendant opposes the motion and has cross-moved to have entries 228509, K167518 and 328312, which are covered by protest No. 1001–3–006912, one of the two protests designated in the summons,[1] severed from this action and dismissed with prejudice as to all claims relating thereto on the grounds that the court lacks jurisdiction of the subject matter and plaintiff lacks standing to maintain the action.

The gravamen of defendant's opposition and cross-motion is that protest No. 1001–3–006912 was filed by "Creative Playthings Inc.," the summons was filed by "Creative Playthings," and the complaint was filed by "Creative Playthings, Division of CBS, Inc." In this connection, defendant relies upon plaintiff's reply to affirmative defense No. 21 of defendant's answer to the complaint, which reply admits that neither "Creative Playthings Inc." nor "Creative Playthings" was a "person" "with respect to the subject matter of the instant action when it filed the protest, or the summons herein, or at

[1] The summons also includes protest No. 1001–3–006287, filed in the name of "Creative Playthings (Div. of Columbia Broadcasting) (Systems Inc.)" which covers entry 297693. Although this entry is not involved in defendant's cross-motion to dismiss, it is subject to defendant's opposition to plaintiff's motion to amend the summons.

any time relevant to this action." [2] In this setting, defendant alleges that the protest was invalid and the summons a nullity which did not confer jurisdiction upon this court.

Defendant, citing 28 U.S.C. 1582(a), as amended,[3] also argues, somewhat inconsistently (memorandum, pp. 2–3) that this court lacks jurisdiction because "Creative Playthings" designated on the summons is not the " 'person [i.e., Creative Playthings Inc.] whose protest * * * has been denied * * *' by Customs."

Defendant does not dispute the validity of documents submitted by plaintiff in support of its motion which show that "Creative Playthings, Inc." was incorporated in New York State in 1950; that on July 18, 1966 the corporate name was changed to "Barecap, Inc."; and that on that same day, Columbia Broadcasting System, Inc., a New York corporation, purchased and acquired substantially all of the assets and properties of Barecap, Inc. and Creative Playthings, Inc., including the name of the latter and the right to use the name, "Creative Playthings," among others.

Defendant agrees that "Columbia Broadcasting System, Inc." is the "proper plaintiff herein," but contends that the filing of the protest by the "nonexistent 'Creative Playthings Inc.' " constitutes a "basic jurisdictional defect" which, in the absence of any proof that "indicate[s] the exact relationship" between the two parties, cannot be remedied by amending the summons (defendant's reply memorandum, p. 2). Defendant claims, in addition (*id.* at 3) that there is no proof that protest No. 1001–3–006912 (filed by plaintiff's counsel) was filed by or on behalf of the proper corporate entity; it also contends that plaintiff is attempting to replace the present caption on the summons with a "deliberate misnomer for plaintiff" (*ibid.*); and that the proposed amended name, "Creative Playthings, Division of CBS, Inc.," is neither the importer, consignee nor authorized agent of the person paying any charge or exaction within the meaning of section 514(b)(1) of the Tariff Act of 1930, as amended (19 U.S.C. 1514(b)(1)).[4] See defendant's memorandum, p. 2.

Plaintiff's response to defendant's charges is that all relevant papers herein "unequivocally" refer to "Creative Playthings, Di-

[2] Plaintiff asserts, however, in its reply to affirmative defenses Nos. 13 and 14, that albeit "Creative Playthings, Inc." was erroneously designated on protest No. 1001-3-006912 and "Creative Playthings" was erroneously designated on the summons, both the protest and the summons were "actually filed by Creative Playthings, Division of CBS, Inc."

[3] Sec. 582(a), as amended, provides in pertinent part:

The Customs Court shall have exclusive jurisdiction of civil actions instituted by any person whose protest pursuant to the Tariff Act of 1930, as amended, has been denied, in whole or in part, by the appropriate customs officer. . . .

[4] Sec. 514, as amended, provides in pertinent part:

. . . Except as otherwise provided . . . protests may be filed by the importer, consignee, or any authorized agent of the person paying any charge or exaction, or filing any claim for drawback, or seeking entry or delivery, with respect to merchandise which is the subject of a decision in subsection (a) of this section.

vision of CBS, Inc." as plaintiff and that at all times the Bureau of Customs (since redesignated the Customs Service) and the Assistant Attorney General's Office (Department of Justice) were aware of the proper plaintiff herein.

Against this background of charges and countercharges, the court turns for enlightenment to the documents and other papers comprising the official files in the entries herein.

It is noted that entry No. K167518, entered September 18, 1972, and entry No. 228509, entered October 10, 1972, list the importer of record as "Creative Playthings" and that the commercial invoice accompanying each of these entries lists the purchaser as "Creative Playthings Inc." Both entries are covered by Term Bond No. 113–31686. The Carrier's Certificate in entry K167518 lists the "owner/consignee" as "Creative Playthings" and the Special Customs Invoice accompanying entry 228509 also lists the purchaser as "Creative Playthings." The bill of lading in the latter entry is made out to the order of "Taub, Hummel & Schnall, Inc.," customhouse brokers. The file in entry 228509 also contains an Application and Special Permit for Immediate Delivery (Customs Form 3461), dated September 20, 1972, which states that the merchandise is to be entered in the name of "Columbia Broadcasting System Inc Creative Playthings Div". The application also states: "Term Bond No. 113–31686 on file in the name of Columbia Broadcasting System Inc as principal, for the period beginning 10/1/71 and ending 9/30/72. $100,000." The "signature of owner, consignee, or agent" is shown in type as "Columbia Broadcasting System Inc. Creative Playthings Div.," followed by an illegibly written signature of its "atty." Notations on the bill of lading and the back of the commercial invoice show that the merchandise was released prior to entry on September 26, 1972. It is also observed that according to the notation on the Carrier's Certificate and the back of the commercial invoice, one piece covered by entry K167518 was released on September 7, 1972, also prior to entry.

The abovementioned immediate delivery permit (Customs Form 3461) issued in connection with the merchandise covered by entry 228509 acquires special significance in light of defendant's claim. For one thing, it indicates that the term bond (No. 113–31686) under which both this entry and entry K167518 were entered was in the name of "Columbia Broadcasting System Inc.," as "principal" [5] and

[5] In this connection, we refer to section 8.28(a) of the Customs Regulations in effect during this period (19 C.F.R. 8.28(a) (1972)), which provided, in pertinent part, that—

(a) When the *importer* desires the release from customs custody of any part of the merchandise before (1) the full amount of duties, including dumping or other special duties and charges, due thereon or the right to free entry has been ascertained by liquidation of the entry, (2) the right of such merchandise to admission into the United States has been determined by the proper officer, or (3) any document relating thereto required by law or regulations has been furnished, he shall, except as hereinafter indicated, file a bond on Customs Form 7551, 7553, or other appropriate form, at the time of entry or prior to such release. . . . [Emphasis added.]

Thus, the term bond filed with Customs was in the name of the *importer*.

that the application for immediate delivery was signed by the attorney for "Columbia Broadcasting System Inc. Creative Playthings Div." as the owner, consignee or agent. Thus, there is no question that the relationship between "Creative Playthings" and "Columbia Broadcasting System Inc." was on record with and known to Customs and that the importer filing the bond was listed therein as "Columbia Broadcasting System Inc."

Another salient aspect of the immediate delivery permit is the requirement governing its issuance, as set forth in section 8.59 of the Customs Regulations then in effect (19 C.F.R. 8.59 (1972)), which provided, in pertinent part:

> (a) Whenever the issuance of a special permit for delivery pursuant to section 448(b), Tariff Act of 1930, is necessary in order to avoid unusual loss or inconvenience to the importer or to the carrier bringing the merchandise to the port, or more effectively to utilize customs manpower or to eliminate or reduce congestion on docks at airports, or other places, such a permit may be issued for the release of any perishable article or any other article for which delivery can be permitted with safety to the revenue, upon appropriate application, as hereinafter provided.
>
> * * * * * * *
>
> (c) Applications for special permits for the delivery of imported articles prior to entry therefor shall be made in duplicate on Customs Form 3461, and shall be supported by evidence satisfactory to the district director of customs *of the right of the applicant to make entry for the articles with respect to which the application is filed.* . . . [Emphasis added.]

Therefore, insofar as the merchandise covered by entry 228509 is concerned, the Bureau of Customs was not only satisfied as to the "right of the applicant to make entry for the articles," it allowed that applicant to make entry in the name of "Creative Playthings," with full knowledge that the "principal" was "Columbia Broadcasting System Inc." and that the consignee was "Columbia Broadcasting System, Inc. Creative Playthings Div." [6] In other words, the aforesaid names were used interchangeably in the customs transaction involved in entry 228509 with both the knowledge and consent of the Bureau of Customs.

Inasmuch as entry K167518 was covered by the same term bond, and the same principal was designated therein, it appears that a like situation existed therein regarding the designation of "Creative Playthings" rather than "Columbia Broadcasting System Inc." as importer of record; that is, entry was made under the former name with the knowledge and consent of Customs.

[6] It must be emphasized that defendant does not suggest nor does the court find any evidence whatsoever of any impropriety with respect to the entering of the merchandise involved in this action.

Turning to entry 328312, which is also the subject of defendant's cross-motion, it is noted that the importer of record is listed as "Creative Playthings Inc", and that the commercial and special customs invoices list the purchaser, respectively, as "Creative Playthings Inc." and "Creative Playthings." The entry was made under Term Bond No. 113–34590, and an immediate delivery permit (Customs Form 3461) was also issued in connection with this shipment. The application for immediate delivery states that the merchandise is to be entered in the name of "Columbia Broadcasting System Inc. Creative Playthings" and refers to "Term Bond No. 113–34590 on file in the name of Columbia Broadcasting System Inc. and its Div. Creative Playthings as principal, for the period beginning 10/1/72 and ending 9/30/73." The merchandise was released prior to entry on December 19, 1972. Accompanying this entry is an Entry Record document (Customs Form 5101) signed by "Creative Playthings Inc. Taub Hummel & Schnall, Inc. Atty." [7]

Thus, as in the case of the other two entries, the relationship between "Columbia Broadcasting System, Inc." and "Creative Playthings" was clearly set forth in the official papers. It therefore must be concluded that when entry was made (subsequent to the release of the merchandise) in the name of "Creative Playthings, Inc." the Bureau of Customs was well aware of the identity of the importer of record.[8]

In short, it is seen that the term bonds covering the three entries in issue were filed with the Bureau of Customs by the importer either as "Columbia Broadcasting System Inc." or "Columbia Broadcasting System Inc. and its Div. Creative Playthings." Accordingly, the entries in question were filed, not by "nonexistent" persons, which would be the case if one were to pursue defendant's logic, but by or on behalf of a very real corporate entity, using an abbreviated version of its name.[9] Hence, whether the entity with which it was dealing was listed as "Creative Playthings," "Creative Playthings Inc.," or, more

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[7] This document shows January 4, 1973 as the date of entry, although on the protest and summons the date of entry is listed as 12/29/72. No explanation is given for the discrepancy in these dates.

[8] It is to be noted that entry 297693, dated December 5, 1972, which, as previously indicated, is covered by protest 1001-3-006287, also involved in this action, but not the subject of defendant's cross-motion, lists "Creative Playthings Div of Columbia Broadcasting System Inc." as importer of record. The commercial and special customs invoices covering this entry name the purchaser, respectively, as "Creative Playthings Inc." and "Creative Playthings." The term bond number is listed as 113-31686 on the consumption entry but is given as 113-34590 (the same as in entry 328312) on the accompanying Application and Special Permit for Immediate Delivery (Customs Form 3461). The application lists the consignee as "Columbia Broadcasting System Inc. Creative Playthings" and states: "Term Bond No. 113-34590 on file in the name of Columbia Broadcasting System Inc. and its Div. Creative Playthings as principal, for the period beginning 10/1/72 and ending 9/30/73." The "owner, consignee or agent" is listed as "Columbia Broadcasting System, Inc. Creative Playthings." The merchandise was released on November 24, 1972.

[9] Significantly, defendant does not question the entry of the merchandise in the name of "Creative Playthings" or "Creative Playthings Inc."

appropriately, "Creative Playthings Div. of Columbia Broadcasting System Inc.," the Bureau of Customs was fully cognizant throughout these transactions of the identity of the party entering the merchandise and filing the protests herein, or on whose behalf these actions were undertaken.

Furthermore, any doubt remaining as to the relationship between the parties designated on entries 328312, 228509 and K167518, on protest No. 1001–3–006912, and on the summons is cleared up by reference to the "importer's number" appearing on both protests herein. On this aspect, section 24.5 of the Customs Regulations then in effect (19 C.F.R. 24.5, 1972) provided, in pertinent part that—

> (a) Each person, business firm, Government agency, or other organization shall file Customs Form 5106, Notification of or Application for Importer's Number or Notice of Change of Name or Address, with the first dutiable formal entry which he submits or the first requests for services that will result in the issuance of a bill or a refund check upon adjustment of a cash collection.
>
> (b) The number to be used when filing Customs Form 5106 shall be . . . . *This number shall be used in all future customs transactions when an importer number is required.* . . . [Emphasis added.]

In addition, section 174.13(2) of the Customs Regulations then in effect (19 C.F.R. 174.13(2), 1972) required the protest to set forth "[t]he importer number of the protestant." And on this score, protest 1001–3–006912 ("Creative Playthings Inc.")—which is here under challenge—and protest 1001–3–006287 ("Creative Playthings (Div. of Columbia Broadcasting) (Systems Inc.)"), both of which are cited on the summons herein, list the same importer number—13–0590730. It follows from this that the presence of the identical importer number on both protests should have alerted defendant (or its counsel) to the fact that the same firm, albeit using variants of its name, was involved in these transactions.

Accordingly, while the better practice would have been to have utilized the full name of the importer and to have included "Columbia Broadcasting System, Inc." as the protesting party on protest No. 1001–3–006912, in view of the known identity of the protestant and the listing of its importer number, we find no basic jurisdictional defect in the fact that only "Creative Playthings Inc." is shown thereon. At the most, failure to include "Columbia Broadcasting System, Inc." was technical error, and the government has suffered no administrative burden or prejudice from the manner in which that protest was filed. We therefore conclude that the protest comports with the requirements of section 514, *supra*. As our appellate court has observed recently, section 514 should be liberally construed in the furtherance

of justice. *United States* v. *Wedemann & Godknecht, Inc. a/c Atwater Throwing Co.*, 62 CCPA 86, 515 F.2d 1145, C.A.D. 1151 (1975). Although the designations shown on the protest and the summons may have been the result of carelessness, in the words of *Wedemann*, 62 CCPA at 92, "the penalty should fit the crime," and the importer-plaintiff "should not have to foot the bill for improving professionalism in the customs bar and among brokers." *Ibid.*

Similarly, with respect to the summons filed herein, although the caption thereon is incomplete, we do not find, in view of the known identity of the party named thereon, that it is jurisdictionally defective.

For the reasons stated, defendant's motion to sever and dismiss entries 228509, K167518 and 328312 is denied.

However, on plaintiff's motion to amend the summons, we find on this record that "Creative Playthings" is a division of "*Columbia Broadcasting System, Inc.*," not "CBS, Inc." There is no evidence of record to indicate the existence of "CBS, Inc." as a corporate entity or as the importer of record herein. Plaintiff's motion is therefore denied without prejudice to its renewal upon a proper showing.

ABSTRACTS OF CUSTOMS COURT DECISIONS

Protests

The following abstracts of decisions of the United States Customs Court at New York are published for the information and guidance of officers of the customs and others concerned.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/1	Landis, J. January 6, 1976	Kaysons Intl., Ltd.	67/63009	Item 651.75 Various ad valorem equivalent rates as set forth in schedule A, attached to decision and judgment in column headed Assessed Ad Valorem Equivalent Rate	Item 651.75 Highest specific or compound rate for any article in set and from which ad valorem equivalent rate was computed; which compound rate should have been assessed once against each article or utensil in set; such rate is set forth in said schedule A in column headed "Claimed Rate"	Import Associates of America et al. v. U.S. (C.A.D. 961)	Los Angeles Flatware sets

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/2	Watson, J. January 6, 1976	N. H. M. Corporation et al.	72-7-01599, etc.	Item 748.20 23.5% or 22%	Item 774.60 11.5% or 10%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of plastic
P76/3	Watson, J. January 6, 1976	Queen City Wreath, Inc.	73-8-02209	Item 748.20 21%	Item 774.60 8.5%	Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Cincinnati (Cleveland) Artificial ferns, fruit, leaves, etc.
P76/4	Watson, J. January 6, 1976	Teters Floral Products Co., Inc.	72-1-00115	Item 748.20 25% or 23.5%	Item 774.60 13.5% or 11.5%	First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Seattle Articles of plastic
P76/5	Watson, J. January 6, 1976	Volvo of America Corp.	73-7-01715	Item 409.00 4.9¢ per lb. + 31%; 4¢ per lb. + 27%	Item 405.25 1.9¢ per lb. + 12.5%; 1.6¢ per lb. + 10.5%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	New York Benzenoid alkyd resin paints

P76/6	Watson, J. January 7, 1976	Volkswagen of America, Inc.	71-7-00526	Item 409.00 7¢ per lb. + 45%; 6.3¢ per lb. + 40%; 5.5¢ per lb. + 36%; 4.9¢ per lb. + 31%; 4¢ per lb. + 27%	Item 405.25 2.8¢ per lb. + 18%; 2.5¢ per lb. + 16%; 2.2¢ per lb. + 14%; 1.9¢ per lb. + 12.5%; 1.6¢ per lb. + 10.5%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	New York; Chicago; Honolulu; Houston; San Francisco; New Orleans; Los Angeles; Toledo (Cleveland); Philadelphia; Boston; Baltimore; Jacksonville, (Tampa); Portland, Oreg. Benzenoid alkyd resin paints
P76/7	Richardson, J. January 8, 1976	United China & Glass Co.	68/6115, etc.	Item 651.75 Various ad valorem equivalents set out in schedule, attached to decision and judgment, in column headed Assessed Rate	Item 651.75 Appropriate compound rate set forth in said schedule	Import Associates of America et al. v. U.S. (C.A.D. 961)	New Orleans Flatware sets, bar sets, etc.
P76/8	Richardson, J. January 8, 1976	Universal Transcontinental Corp.	69/36215	Item 737.15 35%	Item 800.00 Free of duty	Agreed statement of facts	New York American goods returned (one Planetary Drive Display (cut away))
P76/9	Maletz, J. January 8, 1976	Barnebey Cheney Co.	64/2871-S	Par. 69 19%	Par. 1555 4%	Summary judgment Barnebey-Cheney Co. v. U.S. (C.A.D. 1110)	Baltimore "Scrap carbon"
P76/10	Maletz, J. January 8, 1976	Barnebey Cheney Co.	67/87813-S	Item 493.26 15%	Item 703.00 4%	Summary judgement Barnebey-Cheney Co. v. U.S. (C.A.D. 1110)	Baltimore "Scrap charcoal"

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/11	Richardson, J. January 15, 1976	The Baylis Brothers Co.	71-9-01221-S	Item 382.04 42.5% (on full value of merchandise)	Item 807.00 Dutiable upon full value of imported article (smocked dress fronts) less cost of value of American components (fabric pieces of dress fronts); no separate values returned by customs official; entries returned to district director for purpose of determining value of fabric pieces	U.S. v. Baylis Brothers Co. (C.A.D. 1026)	Cincinnati (Cleveland) American goods returned; smocked dress fronts
P76/12	Richardson, J. January 15, 1976	Mitsui & Co. (U.S.A.), Inc.	68/32830	Item 712.50 12%	Item 800.00 Free of duty	Agreed statement of facts	New York American goods returned; aircraft engine parts

P76/13	Watson, J. January 15, 1976	Volkswagen of America, Inc.	66/64084, etc.	Item 400.00 7¢ per lb. + 45%; 6.3¢ per lb. + 40%; 5.5¢ per lb. + 36%; 4.9¢ per lb. + 31%	Item 405.25 2.8¢ per lb. + 18%; 2.5¢ per lb. + 16%; 2.2¢ per lb. + 14%; 1.9¢ per lb. + 12.5%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	New York Benzenoid alkyd resin paints
P76/14	Watson, J. January 15, 1976	Volkswagen of America, Inc.	67/46428, etc.	Item 400.00 7¢ per lb. + 45%; 6.3¢ per lb. + 40%; 5.5¢ per lb. + 36%; 4.9¢ per lb. + 31%	Item 405.25 2.8¢ per lb. + 18%; 2.5¢ per lb. + 16%; 2.2¢ per lb. + 14%; 1.9¢ per lb. + 12.5%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	Houston Benzenoid alkyd resin paints
P76/15	Watson, J. January 15, 1976	Volkswagen of America, Inc.	67/86021, etc.	Item 400.00 7¢ per lb. + 45%; 5.5¢ per lb. + 36%; 4.9¢ per lb. + 31%	Item 405.25 2.8¢ per lb. + 18%; 2.2¢ per lb. + 14%; 1.9¢ per lb. + 12.5%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	Baltimore Benzenoid alkyd resin paints
P76/16	Watson, J. January 15, 1976	Volvo Distributing, Inc.	66/23464, etc.	Item 400.00 7¢ per lb. + 45%; 6.3¢ per lb.+40%; 5.5¢ per lb. + 36%	Item 405.25 2.8¢ per lb. + 18%; 2.5¢ per lb.+16%; 2.2¢ per lb. + 14%	U.S. v. Volkswagen of America, Inc. (C.A.D. 1115)	New York Benzenoid alkyd resin paints
P76/17	Maletz, J. January 15, 1976	Pacific Fast Mail	66/57649	Item 737.90 35%	Item 657.35 1.275¢ per lb. + 15%	Pacific Fast Mail v. U.S. (C.D. 4333)	Seattle Parts of model railroad equipment
P76/18	Richardson, J. January 19, 1976	Creason Corrugating & Mach.	73-10-02826	Item 666.25 6.5%	Item 680.60 1.5%	Judgment on the pleadings Ross Machine & Mill Supply, Inc., et al. v. U. S. (C.D. 4389)	Houston "Rough cast iron bodies"

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/19	Boe, C. J. January 28, 1976	Fedtro, Inc.	68/29460	Item 684.70 15%	Item 685.20 10%	Agreed statement of facts	New York Earphones chiefly used as parts of television apparatus
P76/20	Watson, J. January 28, 1976	Joseph Markovits, Inc.	67/53237	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	New York Artificial flowers, etc., in c.v. of plastics
P76/21	Maletz, J. January 28, 1976	Max Gray et al.	66/2001, etc.	Item 737.15 35% Item 737.90 35%, 28% or 21%	Item 657.20 19% or 15% (items marked "B") Item 657.35 1.275¢ per lb. +15%; 1¢ per lb. +12%; 0.7¢ per lb. +9% (items marked "C")	Pacific Fast Mail v. U.S. (C.D. 4333) (items marked "B" and "C")	San Francisco Parts of model railroad equipment designed chiefly for adult hobbyists and made to specifications of National Model Railroad Association; in c.v. of iron or steel (items marked "B"); in c.v. of brass (items marked "C")
P76/22	Newman, J. January 28, 1976	Libbey-Owens Ford Glass Co.	70/47154	Item 531.39 15%	Item 531.27 3%	Pittsburgh Plate Glass Company v. U.S. (C.D. 4553)	San Francisco Refractory bricks and blocks
P76/23	Boe, C. J. February 4, 1976	Trans-Aire Electronics, Inc.	71-5-00160	Item 684.70 15%	Item 685.22 12.5%	Agreed statement of facts	New York Earphones (not headphones) of a type chiefly used with radios

P76/24	Ford, J. February 4, 1976	Wedemann & Godknecht, Inc., a/c Liberty Fabrics Co., et al.	61/7328, etc.	Par. 1301 25¢ per lb.	Par. 1301 21% but not less than 17¢ per lb.	Wedemann & Godknecht, Inc., a/c Burlington Industries, Inc., et al. v. U.S. (C.D. 3199)	Philadelphia Perlon (nylon), off grade
P76/25	Richardson, J. February 4, 1976	United China & Glass Co.	69/38913	Item 651.75 Various ad valorem equivalents set out in schedule, attached to decision and judgment	Item 651.75 Appropriate compound rate set forth in said schedule	Import Associates of America et al. v. U.S. (C.A.D. 961)	New Orleans Flatware sets, etc.
P76/26	Landis, J. February 4, 1976	Hancock Gross, Inc.	74-8-02126	Item 680.22 11%	Item 773.25 5%	Hancock Gross, Inc. v. U.S. (C.D. 4555, aff'd C.A.D. 1153)	Philadelphia Washers of rubber or plastic
P76/27	Watson, J. February 4, 1976	Inarco Corp.	72-1-00151, etc.	Item 748.20 25%, 23.5% or 22%	Item 774.60 13.5%, 11.5% or 10%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of plastic
P76/28	Watson, J. February 4, 1976	Kashu Central Automotive	71-8-00886	Item 653.39 19%	Item 683.65 5.5%	Warshawsky & Company v. U.S. (C.D. 4410)	Los Angeles Auto fog lights
P76/29	Boe, C. J. February 5, 1976	S.S. Kresge Co.	75-4-00860	Item 706.60 20%	Item 774.60 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	Longview (Portland, Oreg.) Shopping bags

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/30	Watson, J. February 5, 1976	Aldik Artificial Flowers et al.	68/4703, etc.	Item 748.20 28%, 23.5% or 22%	Item 774.60 17%, 11.5% or 10%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of plastic
P76/31	Watson, J. February 5, 1976	First American Artificial Flowers, Inc.	73-8-02370	Item 748.20 21%	Item 774.60 8.5%	Judgment on the pleadings Armbee Trading Corp. et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	New York Article Nos. G1205, Q5903, Q5905
P76/32	Richardson, J. February 10, 1976	Amplifone Corporation	68/4135, etc.	Item 682.10 12.5% Item 682.07 11%, 10% or 8.5% Without allowance under item 807.00	As assessed, with allowance under item 807.00 for cost or value of articles marked "A" (fabricated components, the product of U.S.) on invoices	General Instrument Corporation v. U.S. (C.D. 4507; C.A.D. 1128)	Chicago American goods returned; transformers

P76/33	Watson, J. February 10, 1976	N. H. M. Corporation	71-8-00715, etc.	Item 774.20 25%, 23.5% or 22%	Item 774.60 13.5%, 11.5% or 10%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of plastic
P76/34	Ford, J. February 11, 1976	Standard Commodities Import and Export Corp.	73-11-03037	Item 653.30 19%	Item 653.65 4%	Judgment on the pleadings Warshawsky & Company v. U.S. (C.D. 4410)	Los Angeles Automobile fog lights
P76/35	Watson, J. February 11, 1976	The Akron	73-11-03038	Item 748.20 22% or 21%	Item 774.60 10% or 8.5%	Judgment on the pleadings Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Plastic fern with brown holder
P76/36	Maletz, J. February 11, 1976	Stahlwood Toy Mfg. Co., Inc.	73-3-00672	Item 737.90 21% or 17.5%	Item 737.55 12.5% or 10.5%	Judgment on the pleadings	New York Snap blocks, etc.
P76/37	Ford, J. February 17, 1976	Prepac, Inc.	72-3-00665, etc.	Item 706.60 20%	Item 774.60 10% and 8.5%	Judgment on the pleadings (granted; denied as to entries 455867 and 392619) Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Shopping bags and/or totes

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/38	Richardson, J. February 18, 1976	Mill Engineering & Machinery Co.	70/46329(A)	Item 666.25 8%	Item 680.60 2%	Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	San Francisco Chilled iron hollow roll bodies (non-malleable cast-iron rollers for machines)
P76/39	Landis, J. February 18, 1976	Hancock Gross, Inc.	65/9888	Item 774.60 17%	Item 773.25 10%	U.S. v. Hancock Gross, Inc. (C.A.D. 1153)	Philadelphia Washers
P76/40	Ford, J. February 19, 1976	Creason Corrugating & Mach.	71-6-00463	Item 666.25 8%	Item 680.60 2%	Summary judgment Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Chilled roll bodies (non-malleable cast-iron rollers for machines)
P76/41	Ford, J. February 19, 1976	Ross Machine & Mill Supply Co.	71-9-01194	Item 666.25 6.5%, 8% or 9%	Item 680.60 1.5% or 2%	Summary judgment Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Chilled roll bodies (non-malleable cast-iron rollers for machines)

P76/42	Ford, J. February 19, 1976	Ross Machine & Mill Supply	72-7-01540	Item 666.25 6.5%	Item 680.60 1.5%	Summary judgment Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Chilled roll bodies (nonmalleable cast-iron rollers for machines)
P76/43	Richardson, J. February 19, 1976	Creason Corrugating & Mach.	73-6-01377	Item 666.25 8% or 6.5%	Item 680.60 2% or 1.5%	Summary judgment Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Chilled roll bodies (nonmalleable cast-iron rollers for machines)
P76/44	Ford, J. February 24, 1976	United China & Glass Co.	73-1-00153	Item 706.60 20%	Item 774.60 11.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New Orleans Merchandise in c.v. of plastic
P76/45	Watson, J. February 24, 1976	The Akron et al.	73-12-03515, etc.	Item 748.20 22% or 21%	Item 774.60 10% or 8.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of plastic
P76/46	Re, J. February 24, 1976	Castelazo & Associates Stonewall Trading Co.	68/51151, etc.	Item 705.86 35%	Item 705.85 15%	Agreed statement of facts	Los Angeles Gloves of plastics with textile inserts on thumb

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/47	Richardson, J. February 25, 1976	General Instrument Corporation	71-8-00703, etc.	Item 685.80 12.5%, 12% or 11% (capacitors) Item 687.60 12.5%, 11%, 10% or 8.5% (diodes, transistors, rectifiers) Item 685.20 or 682.60 15%, 13%, 12%, 10%, 9%, 8%, 7% or 6% (color delay lines) Item 687.60 11% or 10% (semiconductor focuses) Item 685.20 10%, 9%, 8%, 7% or 6% (yokes, flybacks, pincushions) Item 682.10 12.5% (tuners)	As assessed, *supra*, with cost or value, as shown on commercial invoices, of U.S. fabricated components (items marked "B", "C", "D", "E", "F", "G", "J", "K", "M", "N", "O", "P") deductible from full value of imported merchandise pursuant to item 807.00	General Instrument Corporation v. U.S. (C.A.D. 1106, items marked "B"); (C.D. 4470, items marked "C"); (C.A.D. 1062, items marked "D"); (C.D. 4408, items marked "E"); (C.A.D. 1128, items marked "J"); C.D. 4507 (items marked "K") Agreed statement of facts (items marked "F", "G", "M", "N", "O", "P")	New York American goods returned; U.S. components of capacitors ("B"), diodes ("C"), transistors ("D"), selenium rectifiers ("E"), color delay lines ("F"), semiconductor focuses ("G"), television deflection yokes ("J"), flybacks ("K"), tuners ("M"), I.F. transformers ("N"), pincushions ("O"), convergence box assemblies ("P")

				Item 682.10 or 682.05 12.5% (I.F. transformers) Item 685.20 or 682.10 12.5%, 10%, 9%, 8%, 7% or 6% (convergence box assemblies) Without allowance under item 807.00			
P76/48	Richardson, J. February 25, 1976	Ross Machine & Mill Supply R. W. Smith & Co., Inc., a/c Ross Machine & Mill Supply Plant	73-6-01376	Item 666.25 8% or 9%	Item 680.60 2%	Summary judgment Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Chilled roll bodies (non-malleable cast-iron rollers for machines)
P76/49	Richardson, J. February 25, 1976	R. W. Smith & Co., Inc., a/c Ross Machine & Mill Supply	73-8-02317	Item 666.25 8%	Item 680.60 2%	Summary judgment Ross Machine & Mill Supply, Inc., et al. v. U.S. (C.D. 4389)	Houston Chilled roll bodies (non-malleable cast-iron rollers for machines)
P76/50	Landis, J. March 3, 1976	Sumitomo Shoji Chicago, Inc.	69/25367	Item 657.20 19% or 17%	Item 609.80 0.1¢ per lb.	Sumitomo Shoji Chicago, Inc. v. U.S. (C.D. 4612)	Chicago Formed steel plates
P76/51	Ford, J. March 4, 1976	Jacobson Nut Mfg. Co., Inc.	74-2-00531, etc.	Item 646.72 and/or 657.20 9.5%	Item 646.56 0.1¢ per lb.	Jacobson Mfg. Co., Inc. v. U.S. (Abs. P74/922)	New York Washered lock-nuts (pek nuts)

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/52	Ford, J. March 4, 1976	Sterling Novelty Products	73-8-02286	Item 706.60 20%	Item 774.60 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Articles in c.v. of plastic
P76/53	Watson, J. March 4, 1976	Quon Quon Co.	72-7-01561	Item 748.20 25%, 23.5%, 22% or 21%	Item 774.60 13.5% or 10%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of of plastic
P76/54	Richardson, J. March 10, 1976	New York Merchandise Co., Inc.	67/75560, etc.	Item 653.40 or 653.39 19%	Item 688.40 11.5%, 10%, 9% or 6.5%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	Portland, Oreg. Decorative, non-illuminating, non-utilitarian merchandise, described as electric bird cages, etc.
P76/55	Richardson, J. March 10, 1976	New York Merchandise Co., Inc.	71-9-01130	Item 688.10 20% applied to full appraised value	Item 688.10 20% on the full appraised value of Christmas tree lighting sets less values of fabricated components	Agreed statement of facts	San Diego American goods returned; Christmas tree lighting sets assembled in Japan of fabricated components which are products of U.S.

					of U.S. ("husks", "clips", "caps", "lite string"), in accordance with item 807.00		
P76/56	Richardson, J. March 16, 1976	Litton Systems, Inc.	73-9-02714	Item 685.20 6% without allowance under item 807.00	Items 685.20/ 807.00 6%; cost or value of U.S. fabricated components marked "A" (magnetic and lead copper wires) deductible from full value of imported yokes in which they were assembled	General Instrument Corporation v. U.S. (C.A.D. 1128)	Nogales American goods returned; yokes; magnetic and lead copper wires
P76/57	Maletz, J. March 16, 1976	Mego Corp.	67/71390, etc.	Item 737.90 35% or 31%	Item 734.20 11.5% or 9%	Mego Corp. v U.S. (C.A.D. 1137)	New York Bagatelle, pinball games, etc.
P76/58	Maletz, J. March 16, 1976	Mego Corp.	73-3-00792, etc.	Item 737.90 28%, 24%, 21% and 17.5%	Item 734.20 8%, 7%, 6% and 5.5%	Mego Corp. v. U.S. (C.A.D. 1137)	New York Pinball, bagatelle, basketelle games, etc.
P76/59	Ford, J. March 23, 1976	Ardalt, Inc., et al.	70/30879, etc.	Item 653.37 17%, 15%, or 13%	Item 653.35 9%, 8% or 7%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candle holders, candlesticks, lamparas, etc.

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/60	Richardson, J. March 23, 1976	Kurt S. Adler, Inc.	74-1-00225	Item 654.20 10% and 11.5%	Item 688.40 6.5% and 9%	Agreed statement of facts	New York "Treetops", etc.; decorative articles for Christmas trees, in c.v. of metal; electrified
P76/61	Richardson, J. March 23, 1976	Kurt S. Adler, Inc.	74-8-02079	Item 653.39 19%	Item 688.40 9%	Agreed statement of facts	New York "Treetops", etc.; decorative articles for Christmas trees, in c.v. of metal; electrified
P76/62	Richardson, J. March 23, 1976	Kurt S. Adler, Inc.	75-8-02007	Item 653.39 19%	Item 688.40 8%	Agreed statement of facts	New York "Treetops", etc.; decorative articles for Christmas trees, in c.v. of metal; electrified
P76/63	Landis, J. March 23, 1970	Arthur J. Fritz, a/c L.B. Foster Company	73-10-02962	Item 664.05 5%	Item 801.00 Free of duty	Agreed statement of facts	Blaine (Seattle) One Kobe K42 Pile Hammer, Serial No. 10-1056, accessories, and tools
P76/64	Newman, J. March 24, 1976	Grafton Spools, Ltd.	70/9601	Item 657.20 17%	Item 657.15 10.5%	Judgment on the pleadings Grafton Spools, Inc. v. U.S. (Abs. P70/790)	New York Metal spools ("E.3")
P76/65	Newman, J. March 24, 1976	Grafton Spools, Ltd.	70/14919	Item 657.20 19%	Item 657.15 12%	Judgment on the pleadings Grafton Spools, Inc. v. U.S. (Abs. P70/790)	Boston Metal spools ("E.3" and "N.51")

P76/66	Newman, J. March 24, 1976	Grafton Spools, Ltd.	70/14921	Item 657.20 17%	Item 657.15 10.5%	Judgment on the pleadings Grafton Spools, Inc. v. U.S. (Abs. P70/790)	Boston Metal spools ("E.3", "N. 51" and "A.110")
P76/67	Newman, J. March 24, 1976	Grafton Spools, Ltd.	70/14927	Item 657.20 19%	Item 657.15 12%	Judgment on the pleadings Grafton Spools, Inc. v. U.S. (Abs. P70/790)	Boston Metal spools ("A.110")
P76/68	Newman, J. March 24, 1976	Grafton Spools, Ltd.	70/34722	Item 657.20 15%	Item 657.15 9.5%	Judgment on the pleadings Grafton Spools, Inc. v. U.S. (Abs. P70/790)	New York Metal spools ("E.3")
P76/69	Newman, J. March 24, 1976	Grafton Spools, Ltd.	70/41903	Item 657.20 19%	Item 657.15 12%	Judgment on the pleadings Grafton Spools, Inc. v. U.S. (Abs. P70/790)	Boston Metal spools ("N.51")
P76/70	Newman, J. March 24, 1976	National Silver Co.	66/69918, etc.	Item 927.53 67.5%+3¢ per pc. Item 927.54 60%	Under item numbers and rates set forth in schedule of cases, attached to decision and judgment, under "Claimed rate" without regard for provisions of items 927.50 through 927.54	National Silver Company v. U.S. (C.D. 4582)	Los Angeles Stainless steel flatware
P76/71	Re, J. March 24, 1976	New York Merchandise Co., Inc.	68/16045	Item 772.15 17%	Item 772.35 12.5%	Venetianaire Corp. of America v. U.S. (C.A.D. 1084)	Portland, Oreg. Vinyl mattress covers, etc.

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/72	Richardson, J. March 25, 1976	Kurt S. Adler, Inc.	70/29404, etc.	Item 653.40 or 653.39 19%	Item 688.40 11.5% and 9%	Agreed statement of facts	New York "Treetops", etc.; decorative articles for Christmas trees, in c.v. of metal; electrified
P76/73	Richardson, J. March 25, 1976	Metco, Inc., et al.	69/44517, etc.	Item 657.20 16%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/74	Richardson, J. March 25, 1976	C. J. Tower & Sons of Niagara, Inc., a/c Metco, Inc.	69/44508, etc.	Item 657.50 16%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/75	Richardson, J. March 25, 1976	C. J. Tower & Sons of Buffalo, Inc., a/c Metco, Inc., et al.	70/35837, etc.	Item 657.50 12.5%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/76	Richardson, J. March 25, 1976	Vantage Products Corp.	73-7-01817	Item 545.67 14% (as entireties)	Item 653.39 19%; export value: $21,512 (16,548 fixtures at $1.30 ea.) Item 687.10 5.5%; export value: $27,635 (16,548 bulbs at $1.67 ea.)	Mobilite, Inc. v. U.S. (C.R.D. 73-11)	San Francisco Light fixtures and bulbs imported together; not entireties

P76/77	Watson, J. March 25, 1976	Kurt S. Adler, Inc.	68/39031, etc.	Item 653.40 or 653.39 19%	Item 688.40 11.5% and 10%	Agreed statement of facts	New York "Treetops", etc.; decorative articles for Christmas trees, in c.v. of metal; electrified
P76/78	Watson, J. March 25, 1976	Lloyds Electronics International	73-11-03031	Item 685.30 6.5%	Item 678.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Combination radio and tape player
P76/79	Watson, J. March 25, 1976	Marcus Display Industries, Inc., et al.	65/13977, etc.	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	Boston Artificial flowers, etc., in c.v. of plastics
P76/80	Re, J. March 25, 1976	New York Merchandise Co., Inc.	73-8-02318	Item 772.06 8% + 10.5¢ per lb.	Item 772.15 8.5%	Davar Products, Inc. v. U.S. (C.D. 3880)	San Diego Plastic snack sets
P76/81	Richardson, J. March 30, 1976	Coleco Industries, Inc.	73-8-02377	Items 735.20 and 734.15 10%	Item 734.20 5.5%	Agreed statement of facts	Champlain-Rouses Point (Ogdensburg) Skillshot basketball games
P76/82	Richardson, J. March 30, 1976	Davar Products, Inc., et al.	68/9162, etc.	Item 653.40 19% (items marked "A", "B" and "C") (as entireties)	Lamps and bulbs not dutiable as entireties; no separate values returned; entries returned to regional commissioner to determine separate values (items marked "A", "B" and "C")	Mobilite, Inc. v. U.S. (C.R.D. 73-11) (items marked "A", "B" and "C")	New York High-intensity lamps and bulbs (items marked "A") Fluorescent lamps and bulbs (items marked "B") Desk lamps with bulbs (items marked "C")

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/83	Richardson, J. March 30, 1976	Otto Kadmon, Inc.	70/6829, etc.	Item 653.40 or 653.39 19%	Item 688.40 11.5%, 9% or 8%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111).	New York Tree tops, Christmas decorations, etc.; non-illuminating, electrical, non-utilitarian articles
P76/84	Richardson, J. March 30, 1976	New York Merchandise Co., Inc.	71-10-01422	Item 653.39 19%	Item 688.40 8%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Sons, Inc. (C.A.D. 1111)	San Diego Decorative, non-illuminating, non-utilitarian merchandise of base metal described as "circle" electric treetops
P76/85	Boe, C. J. March 31, 1976	Astra Trading Corp.	72-7-01494	Item 706.60 20%	Item 774.60 11.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Plastic bags in various sizes, having wide openings and handles with no closure on top
P76/86	Richardson, J. March 31, 1976	Fedtro, Inc.	68/43730	Item 684.70 15%	Item 685.20 10%	Agreed statement of facts	New York Earphones of a type chiefly used as parts of television apparatus

P76/87	Richardson, J. March 31, 1976	Hawker Siddeley, Inc.	70/48092	Item 694.60 7% on value of returned U.S. articles (U.S. $9450)	Items 806.20/ 694.60 7% only upon the cost of Canadian repairs (U.S. $4950)	Agreed statement of facts	New York American goods returned; airplane parts
P76/88	Richardson, J. March 31, 1976	Otto Kadmon, Inc., et al.	69/16267, etc.	Item 653.40 or 653.30 19%	Item 688.40 11.5%, 10% or 9%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	New York Tree tops, Christmas decorations, etc.; non-illuminating, electrical, non-utilitarian articles
P76/89	Richardson, J. March 31, 1976	New York Merchandise Co., Inc.	65/25960, etc.	Item 653.40 19%	Item 688.40 11.5%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	San Diego Decorative, non-illuminating, non-utilitarian merchandise, described as electric bird cages, etc.
P76/90	Richardson, J. March 31, 1976	Oxford International Corp.	69/26179	Item 653.30 19%	Item 685.70 7.5%	Agreed statement of facts	Philadelphia Electrical visual signalling apparatus
P76/91	Maletz, J. March 31, 1976	Coleco Industries, Inc.	75-1-00160, etc.	Item 734.15 10%	Item 734.20 5.5%	Coleco Industries, Inc. v. U.S. (C.D. 4605)	Champlain-Rouses Point (Ogdensburg) Game ("Decision Football")
P76/92	Newman, J. March 31, 1976	Fedtro, Inc.	68/45999, etc.	Item 682.60 15%, 13%, 12% and 10%	Item 688.40 11.5%, 10%, 9% and 8%	Fedtro, Inc. v. U.S. (C.D. 4548)	New York Multi purpose battery charges
P76/93	Re, J. March 31, 1976	Oxford International Corp.	67/44806	Item 653.40 19%	Item 685.70 8.5%	Oxford International Corporation v. U.S. (C.D. 4608)	Chicago "No. 140 Directional Signal Tail Lites with Reflector"

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/94	Ford, J. April 5, 1976	Ardalt, Inc., et al.	70/62475, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candleholders, candlesticks, etc.
P76/95	Ford, J. April 5, 1976	Bibi & Haber Oriental Art, Inc., et al.	68/32405, etc.	Item 653.37 17% or 15%	Item 653.35 9% or 8%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candleholders, candlesticks, etc.
P76/96	Ford, J. April 5, 1976	Commodore Business Machines, Inc.	67/7538	Item 676.23 12.5%	Item 676.20 10.5%	Judgment on the pleadings	New York Calculating machines
P76/97	Ford, J. April 6, 1976	William Adams, Inc., et al.	69/37368, etc.	Item 353.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candleholders, candlesticks, etc.
P76/98	Ford, J. April 6, 1976	J. Gerber & Co., Inc., et al.	68/64249, etc.	Item 653.37 17%	Item 653.35 9%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candleholders, candlesticks, etc.
P76/99	Richardson, J. April 7, 1976	C. J. Tower & Sons of Buffalo, Inc., a/c Metco, Inc.	69/48904, etc.	Item 657.50 16% or 14%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc., a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/100	Landis, J. April 7, 1976	Uniroyal, Inc.	74-7-01745	Item 700.60 20%	Item 700.55 6%	Agreed statement of facts	Charleston Footwear
P76/101	Newman, J. April 7, 1976	Gallagher & Ascher Company et al.	67/13625, etc.	Item 684.70 15% (items marked "A") Item 706.08, 706.60 or	No appraised value found for	Agreed statement of facts (items marked "A") Lafayette Radio Electronics Corp. v. U.S. (C.A.D. 977) (items marked "B")	Chicago Earphones (not headphones) of a type chiefly used with radios (items marked "A")

				791.65 20% (items marked "B")	entirety; merchandise not appraised and liquidated according to law; liquidations void; actions premature and dismissed; entries returned to district director for appropriate administrative action (items marked "B")		Radio cases imported with radios; entireties (items marked "B")
P76/102	Richardson, J. April 12, 1976	Otto Kadmon, Inc., et al.	66/33089, etc.	Item 653.40 or 653.39 19%	Item 688.40 11.5% or 9%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	New York Tree tops, Christmas decorations, etc.; non-illuminating, electrical, non-utilitarian articles
P76/103	Richardson, J. April 12, 1976	Otto Kadmon, Inc.	67/31011, etc.	Item 653.40 19%	Item 688.40 11.5%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	New York Tree tops, Christmas decorations, etc.; non-illuminating, electrical, non-utilitarian articles
P76/104	Richardson, J. April 12, 1976	New York Merchandise Co., Inc.	69/9428, etc.	Item 653.40 or 653.39 19%	Item 688.40 11.5% or 10%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	San Diego Electrical bird cages, etc.; decorative, non-illuminating, non-utilitarian merchandise

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				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/105	Richardson, J. April 13, 1976	C. J. Tower & Sons of Niagara, Inc.	69/44525, etc.	Item 657.50 18%	Items 620.32/ 911.23 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/106	Landis, J. April 13, 1976	Bronton Apparel, Ltd.	75-5-01318	Item 382.81 25¢ per lb. + 27.5%	Item 376.56 16.5%	Agreed statement of facts	New York Girls' snorkel jackets
P76/107	Landis, J. April 13, 1976	Morris Friedman & Co.	74-3-00701	Item 737.90 21%	Item 206.97 10%	Agreed statement of facts	Philadelphia Mushroom magnets
P76/108	Richardson, J. April 14, 1976	J. Kinderman and Sons et al.	73-2-00458, etc.	Item 653.95 8.5% Item 653.39 19%	Item 688.40 9%, 8% or 5.5%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	Philadelphia Tree tops, Christmas decorations, etc.; non-illuminating, electrical, non-utilitarian articles
P76/109	Richardson, J. April 14, 1976	Metco, Inc., et al.	69/44501, etc.	Item 657.50 18%	Items 620.32/ 911.23 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D 1163)	Buffalo-Niagara Falls Composite powder
P76/110	Richardson, J. April 14, 1976	Metco, Inc., et al.	69/44539, etc.	Item 657.50 18%	Items 620.32/ 911.23 Free of duty Item 620.32 1.25¢ per lb.	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/111	Richardson, J. April 14, 1976	C. J. Tower & Sons of Buffalo, a/c Metco, Inc.	71-9-01114, etc.	Item 657.50 12.5% or 10.5%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder

P76/112	Richardson, J. April 14, 1976	Wheeler & Miller	73-7-01816	Item 545.67 16.5% and 14% (as entireties)	Item 653.39 19%; export value: $2,640 (2,400 fixtures at $1.10 ea.); $15,600 (12,000 fixtures at $1.30 ea.) Item 687.10 6% or 5.5%; export value: $4,800 (2,400 bulbs at $2 ea.); $20,040 (12,000 bulbs at $1.67 ea.)	Mobilite, Inc. v. U.S. (C.R.-D. 73-11)	San Francisco Light fixtures and bulbs imported in same shipment, but separately packaged; not entireties
P76/113	Landis, J. April 14, 1976	National Rubber Company, Limited	74-12-03522	Item 774.60 8.5%	Item 692.27 4%	Agreed statement of facts	Buffalo "Splash guards" and "mud flaps"
P76/114	Boe, C.J. April 20, 1976	New York Merchandise Co., Inc.	74-1-00295	Item 706.60 20%	Item 774.60 8.5%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	Portland, Oreg. Merchandise in c.v. of plastic
P76/115	Richardson, J. April 22, 1976	New York Merchandise Co., Inc.	66/6143	Item 927.53 67.5% + 3¢ ea.	Item 650.21 17.5% + 1¢ ea.	U.S. v. Charberjoy Distributors, Inc. (C.A.D. 1068)	San Diego Desert knives
P76/116	Richardson, J. April 22, 1976	U.S. Hobbies, Inc	72-7-01543	Item 737.90 21%	Item 657.20 11%	Pacific Fast Mail v. U.S. (C.D. 4333)	San Francisco Parts of model railroad equipment
P76/117	Watson, J. April 27, 1976	James A. Cole, Inc.	73-11-03248	Item 748.20 21%	Item 774.60 8.5%	Judgment on the pleadings	Los Angeles Plastic flowers, etc.

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P76/118	Watson, J. April 27, 1976	Reliance Trading Corp.	71-9-01064	Item 748.20 28%, 26.5% or 25%	Item 774.60 17%, 15% or 13.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Chicago; Los Angeles Artificial flowers, etc., in c.v. of plastic
P76/119	Watson, J. May 3, 1976	Gambles Import Corp.	73-11-03055	Item 748.20 23.5% or 22%	Item 772.97 11.5% and 10%	Judgment on the pleadings	Los Angeles "Christmas Corsage with Bow"
P76/120	Ford, J. May 5, 1976	Paillard, Inc.	70/60174	Item 676.23 12.5%	Item 676.20 10.5%	Agreed statement of facts	New York Calculators specially constructed for multiplying and dividing
P76/121	Richardson, J. May 5, 1976	C. J. Tower & Sons of Buffalo, Inc., a/c Metco, Inc.	70/30852	Item 657.50 12.5%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/122	Landis, J. May 5, 1976	Patent Scaffolding, Div. of Harsco Corp.	75-4-00987	Item 657.20 9.5%	Item 664.10 5%	Agreed statement of facts	New York Ring, pin and chain assemblies for Burton shores and Burton props
P76/123	Watson, J. May 5, 1976	Azoplate Corp.	67/47171, etc.	Item 409.00 45%+7¢ per lb. or 36%+5.5¢ per lb.	Item 406.50 40% or 32%	Agreed statement of facts	New York Ozasol chemicals developer ELO1

P76/124	Watson, J. May 5, 1976	Westwood Import Co., Inc.	73-12-03447	Item 772.06 13.5%+16.5¢ per lb.	Item 772.15 13.5%	Davar Products, Inc. v. U.S. (C.D. 3880)	San Diego Plastic snack sets
P76/125	Ford, J. May 6, 1976	Abels Wasserberg & Co., Inc., et al.	67/13373, etc.	Item 653.40 19%	Item 653.35 10.5%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candleholders, candlesticks, etc.
P76/126	Ford, J. May 6, 1976	Eisenberg-Lozano, Inc., et al.	71-8-00686, etc.	Item 653.37 15%, 13% or 11%	Item 653.35 8%, 7% or 6%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candleholders, candlesticks, etc.
P76/127	Ford, J. May 6, 1976	The May Dept. Stores Co. et al.	73-8-02219, etc.	Item 653.37 13% or 11%	Item 653.35 7% or 6%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157; C.D. 4561, aff'd C.A.D. 1156)	New York Candleholders, candlesticks, etc.
P76/128	Ford, J. May 6, 1976	Charles Sadek Import Co., Inc.	66/51808, etc.	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157; C.A.D. 1156)	New York Candleholders, candlesticks, etc.
P76/129	Ford, J. May 6, 1976	Wilmar Co., Inc., et al.	66/13873, etc.	Item 653.40 19%	Item 653.35 10.5%	U.S. v. Morris Friedman & Co. (C.A.D. 1157; C.A.D. 1156)	New York Candleholders, candlesticks, etc.
P76/130	Richardson, J. May 6, 1976	Otto Kadmon, Inc.	74-5-01322	Item 653.39 19%	Item 688.40 8%	Ross Products, Inc. v. U.S. (C.A.D 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	Seattle Tree tops, Christmas decorations, etc.; decorative, non-illuminating, electrical, non-utilitarian articles
P76/131	Landis, J. May 6, 1976	New York Merchandise Co., Inc.	69/51307	Item 651.75 22.9% (ad valorem equivalent rate)	Item 651.75 1¢ ea. + 12.5%	Import Associates of America et al. v. U.S. (C.A.D. 961)	San Diego Flatware sets

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P76/132	Watson, J. May 6, 1976	Westwood Import Co., Inc.	68/54913, etc.	Item 748.20 28%, 26.5% or 25%	Item 774.60 17%, 15% or 13.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.A.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	San Diego Merchandise in c.v. of plastics
P76/133	Watson, J. May 10, 1976	L. Batlin & Son, Inc.	67/18921, etc.	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279)	New York Artificial flowers, etc., wholly or almost wholly of plastic.
P76/134	Watson, J. May 10, 1976	Teters Floral Products	66/73217-S, etc.	Item 748.20 28%, 26.5% or 25% (items marked "A" and "B")	Item 774.60 17%, 15% or 13.5% (items marked "A" and "B")	Armbee Corporation et al. v. U.S. (C.D. 3278); Zunold Trading Corporation et al. v. U.S. (C.D. 3279) (items marked "A") Joseph Markovits, Inc. v. U.S. (C.D. 4396) (items marked "B")	Seattle Artificial flowers, etc., in c.v. of plastics (items marked "A") Articles of plastics of single pieces or parts obtained in one piece by molding (items marked "B")
P76/135	Landis, J. May 11, 1976	Lafayette Electronics Int'l., Inc.	74-2-00453	Item 682.60 9%	Item 688.40 6.5%	Judgment on the pleadings	New York 4-channel adaptor or 4-channel decoder

P76/136	Richardson, J. May 19, 1976	Amplifone Corporation	69/10574, etc.	Item 682.10 12.5% Item 682.07 11%, 10%, or 8.5% Without allowance under item 807.00	As assessed, with allowance under item 807.00 for cost or value of articles marked "A" (fabricated components, the product of U.S.) on invoices	General Instrument Corporation v. U.S. (C.D. 4507; C.A.D. 1128)	Chicago American goods returned; transformers or coils
P76/137	Richardson, J. May 19, 1976	Otto Kadmon, Inc.	68/2754, etc.	Item 653.40 or 653.39 19%	Item 688.40 11.5% or 10%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	New York Tree tops, Christmas decorations, etc.; non-illuminating, decorative, electrical, non-utilitarian articles
P76/138	Landis, J. May 20, 1976	Hancock Gross, Inc.	67/7811, etc.	Item 774.60 17%, 15% or 13.5% Item 774.25 12.5% or 11%	Item 773.25 10%, 9% or 8%	U.S. v. Hancock Gross, Inc. (C.A.D. 1153)	Philadelphia Gaskets of rubber or plastics; faucet washers not Canadian articles
P76/139	Ford, J. May 25, 1976	J. Gerber & Company et al.	71–5–00163, etc.	Item 653.37 15% or 13%	Item 653.35 8% or 7%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candleholders, candlesticks, etc.
P76/140	Landis, J. May 25, 1976	Hancock Gross, Inc	65/9886, etc.	Item 774.60 17% Item 774.25 12.5%	Item 773.25 10%	U.S. v. Hancock Gross, Inc. (C.A.D. 1153)	Philadelphia Gaskets of rubber or plastics; faucet washers; not Canadian articles
P76/141	Malets, J. May 25, 1976	Mego Corp.	70/62038	Item 737.90 35%	Item 737.55 21%	Agreed statement of facts	New York Toy alphabet blocks or toy building blocks, bricks or shapes

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P76/142	Maletz, J. May 25, 1976	Thornton Glove Co., Inc.	74-12-03304	Item 734.97 9%	Item 735.05 7.5% (Claim overruled as to model No. 7952M)	Judgment on the pleadings	New York Gloves, model Nos. 8771, 8771M
P76/143	Re, J. May 25, 1976	Kohner Bros., Inc.	70/48343	Item 737.90 24%	Item 734.15 14%	Agreed statement of facts	New York Solid rubber snakes, etc.; articles used as parts of games played on boards of special design
P76/144	Richardson, J. June 2, 1976	Metco, Inc., et al.	69/44503, etc.	Item 657.50 18% or 16%	Item 620.32 1.25¢ per lb.; and free of duty (1968 entries)	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/145	Richardson, J. June 2, 1976	C. J. Tower & Sons of Buffalo, Inc., a/c Metco, Inc.	69/48896, etc.	Item 657.50 16% or 14%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/146	Richardson, J. June 2, 1976	C. J. Tower & Sons of Buffalo, Inc., a/c Metco, Inc.	70/30845, etc.	Item 657.50 16%, 14% or 12.5%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/147	Maletz, J. June 2, 1976	Goldfarb Novelty, a/c Amtel, Inc.	70/3302, etc.	Item 737.90 28%	Item 734.20 8%	Mego Corp. v. U.S. (C.A.D. 1137)	New York Plastic pinball games, plastic bagatelle games, etc.

P76/148	Maletz, J. June 2, 1976	Specialty Industries, Div. of Amtel, Inc.	72-6-01303	Item 737.90 21%	Item 734.20 6%	Mego Corp. v. U.S. (C.A.D. 1137)	New York Plastic pinball games, or plastic bagatelle games, etc.
P76/149	Newman, J. June 2, 1976	New York Merchandise Co., Inc.	73-3-00743	Item 683.70 35%	Item 737.90 24% or 21%	Amico, Inc. v. U.S. (C.D. 4494)	Los Angeles; San Diego Halloween flashlights, pumpkin-head flashlights, skeleton flashlights, etc.
P76/150	Ford, J. June 3, 1976	Bar-Zel Expediters, Inc., a/c Lobeco, Inc.	73-2-00604	Item 760.60 20%	Item 774.60 10%	Adolco Trading Co. et al. v. U.S. (C.D. 4487)	New York Shopping bags
P76/151	Ford, J. June 3, 1976	Morris Friedman & Co.	68/64865, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8%, or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	Philadelphia Table, floor or portable indoor lamps, of brass
P76/152	Landis, J. June 3, 1976	Ataka America, Inc.	71-12-01909, etc.	Item 708.71 24%, 23%, 22% and 21% Item 708.72 30%, 27%, 25% and 22% Item 708.73 40%, 36%, 31% and 27%	Item 708.80 27%, 24%, 21% or 18%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Various parts of microscopes
P76/153	Watson, J. June 3, 1976	Kurt S. Adler, Inc.	69/29784, etc.	Item 653.40 or 653.39 19%	Item 688.40 11.5%, 10% or 9%	Agreed statement of facts	New York "Treetops", etc.; decorative articles for Christmas trees, in c.v. of metal; electrified

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P76/154	Maletz, J. June 3, 1976	Specialty Industries	71-6-00333	Item 737.90 24% or 21%	Item 734.20 6% or 7%	Mego Corp. v. U.S. (C.A.D. 1137)	New York Plastic pinball games, plastic bagatelle games, etc.
P76/155	Ford, J. June 8, 1976	Morris Friedman & Co.	68/58602, etc.	Item 653.37 17%, 15% or 13%	Item 653.35 9%, 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156)	Philadelphia Table, floor or portable indoor lamps, of brass
P76/156	Ford, J. June 8, 1976	Hallmark Cards, Inc.	69/19097, etc.	Item 653.37 15% or 13%	Item 653.35 8% or 7%	U.S. v. Morris Friedman & Co. (C.A.D. 1156; C.A.D. 1157)	Kansas City Candleholders, candlesticks, sconces, etc.
P76/157	Ford, J. June 8, 1976	Langfelder, Homma & Carrol, Inc., et al.	75-8-02112, etc.	Item 653.37 13%, 11% or 9.5%	Item 653.35 7%, 6% or 5%	Morris Friedman & Co. v. U.S. (C.D. 4570, aff'd C.A.D. 1157)	New York Candleholders, candlesticks, etc.
P76/158	Watson, J. June 15, 1976	Paillard, Inc.	74-2-00454	Item 676.23 12.5%	Item 676.20 10.5%	Judgment on the pleadings	New York "Hermes Adding Machines, Models 161-12 and 163-12"
P76/159	Watson, J. June 16, 1976	Adolco Trading Corp. Adolco Trading Co., Inc.	74-4-00879, etc.	Item 389.60 25¢ per lb.+ 18%; or 25¢ per lb.+ 15%	Item 386.08 30% or 25%	Agreed statement of facts	New York Net string shopping bags; net articles

P76/160	Newman, J. June 16, 1976	National Silver Co.	67/27539, etc.	Item 927.53 67.5%+3¢ per pc. Item 927.54 60%	Dutiable under item numbers [650.55; 650.39] and rates [17%; 1¢ ea.+12½%] set forth in schedule of cases, attached to decision and judgment, under "claimed rate"	National Silver Company v. U.S. (C.D. 4582)	Los Angeles Stainless steel flatware
P76/161	Richardson, J. June 23, 1976	Otto Kadmon. Inc.	66/19878, etc.	Item 653.40 19%	Item 688.40 11.5%	Ross Products, Inc. v. U.S. (C.A.D. 994) U.S. v. L. Batlin & Son, Inc. (C.A.D. 1111)	New York Tree tops, Christmas decorations, etc.; non-illuminating, decorative, electrical, non-utilitarian articles
P76/162	Richardson, J. June 23, 1976	F. W. Myers & Co., Inc.	66/10773, etc.	Item 657.50 18%	Item 620.32 1.25¢ per lb.	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Meteo, Inc. (C.A.D. 1163)	Champlain (Ogdensburg) Composite powder
P76/163	Richardson, J. June 23, 1976	C. J. Tower & Sons, a/c Meteo, Inc.	73-2-00484, etc.	Item 657.50 10.5% or 9% Item 948.00 Additional 10% for entries made during 8/15/71 – 12/20/71	Item 620.32 Free of regular and additional duties Claim abandoned-dismissed as to entry 230257	U.S. v. C.J. Tower & Sons of Buffalo, Inc. a/c Meteo, Inc. (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/164	Richardson, J. June 24, 1976	Metco, Inc.	69/22423	Item 657.50 16%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, Inc. (C.A.D. 1163)	New York Composite powder
P76/165	Richardson, J. June 24, 1976	C. J. Tower & Sons, a/c Metco, Inc.	74-12-03376, etc.	Item 657.50 9%	Item 620.32 Free of duty	U.S. v. C. J. Tower & Sons of Buffalo, Inc. a/c Metco, (C.A.D. 1163)	Buffalo-Niagara Falls Composite powder
P76/166	Landis, J. June 24, 1976	Ataka America, Inc.	71-11-01594	Items 708.72 and 708.73 30%; 40% and 36% (items marked "A") Item 708.93 40% (items marked "B")	Item 708.80 27% or 24% (items marked "A" and "B")	Olympus Corp. of America v. U.S. (C.D. 4538) (items marked "A") Agreed statement of facts (items marked "B")	New York Various parts of microscopes (items marked "A") Frames and mountings, and parts thereof which are parts of compound optical microscopes (items marked "B")
P76/167	Landis, J. June 24, 1976	Ataka America, Inc.	71-11-01595	Item 708.71, 780.72 or 708.73 22%, 21%; 30%, 27%, 22%; or 45%, 40%, 36%, 31%, 27%	Item 708.80 27%, 24%, 21% or 18%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Various parts of microscopes

P76/168	Landis, J. June 24, 1976	Ataka America, Inc.	72-5-01144, etc.	Item 708.71, 708.72, 708.73 or 708.75 22%, 21%, 20%; 27%, 25%, 20%; 45%, 40%, 36%, 31%, 27%, 22.5%; 27%	Item 708.80 30%, 27%, 24%, 21%, 18% or 15%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Various parts of microscopes
P76/169	Landis, J. June 24, 1976	Olympus Corp. of America et al.	72-5-01146 etc.	Item 708.73 31%, 27% and 22.5%	Item 708.80 21%, 18% or 15%	Olympus Corp. of America v. U.S. (C.D. 4538)	New York Various parts of microscopes
P76/170	Watson, J. June 30, 1976	New York Merchandise Co., Inc.	67/20447	Item 748.20 28%	Item 774.60 17%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	San Diego Merchandise in c.v. of plastic
P76/171	Watson, J. June 30, 1976	Standard Brands Paint Co.	68/67118	Item 202.66 17%	Item 206.60 12%	Standard Brands Paint Co. v. U.S. (C.A.D. 1148)	Los Angeles Unassembled wood picture frames, mitred, packed two pieces to a package
P76/172	Watson, J. June 30, 1976	James G. Wiley Co., a/c NHM Corp., et al.	73-11-03035, etc.	Item 748.20 23.5%, 22% or 21%	Item 774.60 11.5%, 10% or 8.5%	Armbee Corporation et al. v. U.S. (C.D. 3278) Zunold Trading Corporation et al. v. U.S. (C.D. 3279) First American Artificial Flowers, Inc. v. U.S. (C.D. 4185) Joseph Markovits, Inc. v. U.S. (C.D. 4396)	Los Angeles Merchandise in c.v. of plastic

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	ASSESSED	HELD	BASIS	PORT OF ENTRY AND MERCHANDISE
				Par. or Item No. and Rate	Par. or Item No. and Rate		
P76/173	Maletz, J. June 30, 1976	Coleco Industries, Inc.	74-6-01526	Items 734.15 and 735.20 10%	Item 734.20 5.5%	Coleco Industries, Inc. v. U.S. (C.D. 4605)	Champlain-Rouses Point (Ogdensburg) Game ("Decision Football")
P76/174	Newman, J. June 30, 1976	King Athletic Goods Corp.	74-1-00030	Item 685.30 6.5%	Item 768.50 5%	Montgomery Ward & Co. v. U.S. (C.D. 4573)	New York Stereo radio with 8-track tape player, model RP 302 with cutout for mini-changer
P76/175	Re, J. June 30, 1976	New York Merchandise Co.	68/33157	Item 772.15 17%	Item 772.35 12.5%	Venetianaire Corp. of America v. U.S. (C.A.D. 1084)	San Diego Vinyl mattress covers

ABSTRACTS OF CUSTOMS COURT DECISIONS

Reappraisements

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/1	Watson, J. January 6, 1976	Mitsubishi International Corp.	R61/5588	American selling price	$1.52 less 6% per pair, net packed	Agreed statement of facts	New Orleans Footwear (women's, No. 600S)
R76/2	Watson, J. January 6, 1976	Mitsubishi International Corp.	R62/13059	American selling price	$1.73 less 6% per pair, net packed	Agreed statement of facts	Galveston Footwear (women's, Nos. 118R and 140A)
R76/3	Watson, J. January 8, 1976	Mitsubishi International Corp.	R61/3525, etc.	American selling price	As shown in schedule B, attached to decision and judgment, for respective pattern numbers and sizes listed therein, on dates of exportation as shown, per pair, net packed	Agreed statement of facts	New Orleans Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/4	Watson, J. January 8, 1976	Mitsubishi International Corp.	R61/9326, etc.	American selling price	As shown in schedule B, attached to decision and judgment, for respective pattern numbers and sizes listed therein, on dates of exportation as shown, per pair, net packed	Agreed statement of facts	Los Angeles Footwear
R76/5	Watson, J. January 8, 1976	Mitsubishi International Corp.	R62/1430, etc.	American selling price	As shown in schedule B, attached to decision and judgment, for respective pattern numbers and sizes listed therein, on dates of exportation as shown, per pair, net packed	Agreed statement of facts	Los Angeles Footwear
R76/6	Watson, J. January 8, 1976	Mitsubishi International Corp.	R62/5101, etc.	American selling price	As shown in schedule B, attached to decision and judgment, for respective pattern numbers and sizes listed therein, on dates of exportation as shown, per pair, net packed	Agreed statement of facts	Los Angeles Footwear

R76/7	Boe, C. J. January 13, 1976	Mitsubishi International Corp.	R61/872, etc.	American selling price	As shown in schedule B, attached to decision and judgment, for respective pattern numbers and sizes listed therein, on dates of exportation as shown, per pair, net packed	Agreed statement of facts	New York Footwear
R76/8	Boe, C. J. January 15, 1976	Chadwick Miller Importers, Inc., et al.	R60/7681, etc.	American selling price	Set forth under column "Unit Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	Boston Footwear
R76/9	Boe, C. J. January 15, 1976	Frank P. Dow Co., Inc.	R61/18355, etc.	American selling price	Set forth under column "Unit Value Per Pair" on schedule "A" attached to decision and judgment	Agreed statement of facts	Seattle Footwear
R76/10	Boe, C. J. January 19, 1976	A & A Trading Corp.	73-3-00788	Export value	Appraised values less amounts described as commission, purchasing agent's commission or buying commission which were included in appraised values by Customs Entry 138815 severed; amended summons and complaint therefor shall be filed within 30 days of service of order	Judgment on the pleadings A & A Trading Corp. v. U.S. (C.D. 4472)	Seattle Merchandise covered by entry invoices which specify A & A Japan, Ltd.; and A & A Japan Ltd. or Allied Sales Corp. as having been involved in transaction

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/11	Re, J. January 28, 1976	Patrick & Graves	R60/8846, etc.	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Houston Japanese plywood
R76/12	Boe, C. J. February 4, 1976	Mitsubishi International Corp.	R61/13488, etc.	American selling price	As shown on schedule B, attached to decision and judgment, for respective pattern numbers and sizes listed therein, on dates of exportation as shown, per pair, net packed	Agreed statement of facts	Houston Footwear
R76/13	Richardson, J. February 4, 1976	Delta Steel, Inc.	R65/23559	Cost of production	DM 3404.48	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Volkswagen automobiles
R76/14	Boe, C. J. February 5, 1976	Bruce Duncan Co., Inc. Asiatic Import Co. et al.	R62/3827, etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	Los Angeles Footwear
R76/15	Boe, C. J. February 5, 1976	Import-Export Corp. of Texas	73-12-03461	Export value	Appropriate value listed on schedule, attached to decision and judgment, in column designated "claimed value (per piece)"	Agreed statement of facts	Houston Various wigs, hairpieces, etc.

R76/16	Boe, C. J. February 5, 1976	Nomura Trading Co. et al.	R61/7157, etc.	American selling price	As set forth under column "Unit Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	New York Footwear
R76/17	Richardson, J. February 5, 1976	Amertel Corporation et al.	R61/12056, etc.	Cost of production	Specified on schedule, attached to decision and judgment, in column designated "Claimed Value"	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Los Angeles Volkswagen automobiles
R76/18	Richardson, J. February 5, 1976	Investment Associates, Inc.	R60/7220, etc.	Cost of production	Specified on schedule, attached to decision and judgment, in column designated "Claimed Value"	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Los Angeles Volkswagen automobiles
R76/19	Richardson, J. February 5, 1976	North Shepherd Imported Cars, Inc.	R64/21282, etc.	Cost of production	Specified in schedule, attached to decision and judgment, in column designated "Claimed Value"	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R76/20	Maletz, J. February 5, 1976	J. L. Wood	R70/9191, etc.	Export value	Various invoice values less duty or other nondutiable charges included in said invoice values	J. L. Wood v. U.S. (C.A.D. 1139)	Pembina Engine heaters (with or without cords), car warmers, parts or accessories
R76/21	Ford, J. February 17, 1976	Patrick & Graves	R61/4840	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	Houston Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/22	Richardson, J. February 17, 1976	H.M. Young Associates, Inc.	R67/21706, etc.	Constructed value	Invoiced prices	H.M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York Tapes Webbing 3¾" #7010; Tapes Webbing 4" #7300; Cotton Waistband Elastic 3¾" #7010; Cotton Elastic Wasitband 3¾" #7010, etc.
R76/23	Richardson, J. February 17, 1976	H.M. Young Associates, Inc.	R69/9028, etc.	Constructed value	Invoiced prices (for Tapes Webbing 3¾" #7010; Cotton Waistband Elastic 3¾" #7010; Cotton Elastic Waistband 3¾" #7010, etc.) Invoiced prices less stated discounts (for identical articles having added description "with 4, 5, or 6 splices")	H.M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York See "Held Value" column for merchandise
R76/24	Ford, J. February 18, 1976	Dunnington & Arnold, Inc., a/c Ruby Importing Co.	R58/12022	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	New York Footwear

R76/25	Ford, J. February 18, 1976	Maher & Company, a/c Ruby Importing Co., et al.	R58/26547, etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	New Orleans Footwear
R76/26	Ford, J. February 18, 1976	New York Merchandise Co., Inc.	R62/10171 etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	Portland, Oreg. Footwear
R76/27	Richardson, J. February 18, 1976	H. M. Young Associates, Inc.	R68/13442, etc.	Constructed value	Invoiced prices (for Tapes Webbing 3¾" #7010; Cotton Waistband Elastic 3¾" #7010; Cotton Elastic Waistband 3¾" #7010, etc.) Invoiced prices less stated discounts (for identical articles having added description "with 4, 5, or 6 splices")	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York See "Held Value" column for merchandise
R76/28	Richardson, J. February 18, 1976	H. M. Young Associates, Inc.	72-8-01726, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York Tapes Webbing 3¾" #7010, 4" #7300, etc.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/29	Ford, J. February 24, 1976	New York Merchandise Co., Inc.	R60/11452, etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	San Diego Footwear
R76/30	Ford, J. February 24, 1976	The Ruby Importing Co.	R59/12008, etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	Los Angeles Footwear
R76/31	Ford, J. February 24, 1976	Thalson Company	R62/2920, etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	San Francisco Footwear
R76/32	Ford, J. February 25, 1976	International Fashions	75-8-02144	Export value	$21.30 per doz. pcs., net packed, for 200 doz. long sleeve sweaters; $17.30 per doz. pcs., net packed, for 600 doz. short sleeve sweaters	Judgment on the pleadings	Los Angeles Sweaters

R76/33	Richardson, J. February 25, 1976	Tanross Supply Company	R68/5627	Export value	$7.85 (700 pcs. No. 306), $6.30 (700 pcs. No. 310), $7.95 (520 pcs. No. 312), $7.75 (1500 pcs. No. 318), net packed	Agreed statement of facts	Miami Binoculars
R76/34	Richardson, J. February 25, 1976	Tanross Supply Company	R69/1853	Export value	$6.85 (1000 pcs. No. 304), $8.45 (2500 pcs. No. 306), $8.85 (500 pcs. No. 322), $8.30 (2000 pcs. No. 318), net packed	Agreed statement of facts	Miami Binoculars
R76/35	Richardson, J. February 25, 1976	Tanross Supply Company	R69/5206	Export value	$6.85 (500 pcs. No. 304), $8.45 (580 pcs. No. 306), $8.85 (80 pcs. No. 322), net packed	Agreed statement of facts	Miami Binoculars
R76/36	Richardson, J. February 25, 1976	Tanross Supply Company	R69/9951	Export value	Invoice price, plus dutiable charges, plus packing (226 pcs. No. 11TE, 300x reflector telescope; 900 pcs. No. 67-7160, 15x-90x 60 mm varipower telescope.	Agreed statement of facts	Miami Telescopes
R76/37	Ford, J. March 3, 1976	Distributors Import Co.	R62/3132	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	New Orleans Footwear

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/38	Richardson, J. March 3, 1976	F & D Trading Corp.	R62/14586	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (in Deutsch Mark)" for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Jacksonville (Tampa) Various model Volkswagen automobiles
R76/39	Richardson, J. March 3, 1976	F & D Trading Corp. et al.	R65/23189, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (in Deutsch Mark)" for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Various model Volkswagen automobiles
R76/40	Richardson, J. March 3, 1976	Veo & Grant, Inc.	R67/7501, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (in Deutsch Mark)" for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Baltimore Various model Volkswagen automobiles

R76/41	Richardson, J. March 4, 1976	Madison Imports Corp.	R66/25088	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (in Deutsch Mark)" for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Los Angeles Various model Volkswagen automobiles
R76/42	Ford, J. March 10, 1976	Consolidated Merchandising Corp.	R68/15439	Constructed value	$1.082 (radio receivers), $0.08 (earphones), $0.10 (batteries), each, net packed	Judgment on the pleadings.	New York Solid-state (tubeless) radio receivers, with batteries and/or earphones
R76/43	Richardson, J. March 16, 1976	F & D Trading Corp.	R61/23713, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Values (in Deutsch Marks)" for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Baltimore Various model Volkswagen automobiles
R76/44	Richardson, J. March 16, 1976	Great Empire Corp.	R66/5287, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Values (all in Deutsch Mark)" for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/45	Richardson, J. March 16, 1976	Great Empire Corp.	R68/5340, etc.	Cost of production	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Values (in Deutsch Mark)" for each automobile model	U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Various model Volkswagen automobiles
R76/46	Richardson, J. March 16, 1976	Usico Imports, Inc.	R66/1667, etc.	Cost of production	Value specified on schedule, attached to decision and judgment, in column designated "Claimed Value" for each automobile	U.S. v. F & D Trading Corp. (C.A.D. 1089)	Houston Volkswagen automobiles
R76/47	Richardson, J. March 23, 1976	H.M. Young Associates, Inc.	R66/21951, etc.	Constructed value	Invoiced prices (appraised values less $0.36)	H.M. Young Associates, Inc. v. U. S. (C.D. 4388, aff'd C.A.D. 1138)	New York Tapes Webbing 3¾" 7010; Cotton Waistband-Elastic 7010 3¾"; Cotton Elastic Waistband 7010 3¾", etc.
R76/48	Richardson, J. March 23, 1976	H.M. Young Associates, Inc.	74-6-01592	Constructed value	Appraised values less $0.36 per yard	H.M. Young Associates, Inc. v. U. S. (C.D. 4388, aff'd C.A.D. 1138)	New York Tapes Webbing 7010 3¾" 7300 4", etc.

R76/49	Richardson, J. March 24, 1976	New York Merchandise Co., Inc.	R60/6806, etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	Los Angeles Footwear
R76/50	Richardson, J. March 24, 1976	The Ruby Importing Co.	R59/99, etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	Los Angeles Footwear
R76/51	Richardson, J. March 24, 1976	The H. A. Seinsheimer Co.	R67/8007, etc.	Constructed value	Appraised values less $0.36 per yard	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	Cincinnati (Cleveland) "Cotton elastic fabric, Article Nos. 52135 or 52120"
R76/52	Richardson, J. March 24, 1976	Samuel Wineburg Co. et al.	R62/14015, etc.	American selling price	Set forth under column "Unit Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	Chicago Footwear
R76/53	Richardson, J. March 30, 1976	Topp Import & Export, Inc.	R68/15289	Constructed value	$5.55 ("Fiesta" TFM-122), $6.40 ("Juliette" T-1490), $6.60 ("Juliette" TK-114), per set, net packed	Judgment on the pleadings	Los Angeles Radios with accessories

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/54	Richardson, J. April 5, 1976	A & A Trading Corp.	74-1-00162, etc.	Export value	Appraised values less amounts described as commission, purchasing agent's commission or buying commission which were included in appraised values	Judgment on the pleadings	Los Angeles Merchandise covered by invoices which specify A & A Japan, Ltd. and A & A Japan, Ltd. or Allied Sales Corp. as having been involved in the transaction
R76/55	Landis, J. April 7, 1976	Montgomery Ward & Co. et al.	R61/14862, etc.	American selling price	Set forth under column "Unit Value Per Pair" on schedule attached to decision and judgment	Agreed statement of facts	San Francisco Footwear (tennis shoes)
R76/56	Re, J. April 7, 1976	Wood Mosaic Industries, Inc.	R60/9186	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Charleston Japanese plywood
R76/57	Landis, J. April 15, 1976	A & A Trading Corp.	72-11-02205	Export value	Appraised values less amounts described as commission which were included in the appraised values by customs	Judgment on the pleadings	San Francisco Electrical articles

R76/58	Landis, J. April 15, 1976	A & A Trading Corp.	74-3-00621	Export value	Appraised values less amounts described as commission, purchasing agent's commission, or buying commission which were included in appraised values by customs	Judgment on the pleadings	Seattle Electrical articles
R76/59	Landis, J. April 15, 1976	Florsheim Shoe Co., Div. of Interco, Inc.	73-3-00818, etc.	Foreign value	Appraised unit values less 1% cash discount, packed	Agreed statement of facts	Chicago Calf upper leather, kid upper leather, kid lining leather
R76/60	Re, J. April 20, 1976	Kochton Plywood & Veneer Co., Inc.	R61/22241	Export value	Net appraised value less 7¼%, net packed	U.S. v. Getz Bros. & Co. et al. (C.A.D. 927)	Longview (Portland, Oreg.) Japanese plywood
R76/61	Landis, J. April 22, 1976	Mitsubishi International Corp.	R61/7682, etc.	American selling price	Appropriate value listed on schedule, attached to decision and judgment, in column designated "Claimed Value (Per Pair)"	Agreed statement of facts	New York Footwear
R76/62	Landis, J. April 27, 1976	A & A Trading Corp.	73-3-00788-81	Export value	Appraised values less amounts described as commission, purchasing agent's commission or buying commission which were included in appraised values by customs	Judgment on the pleadings	Seattle Merchandise covered by invoices which specify A&A Japan, Ltd.; and A&A Japan, Ltd. or Allied Sales Corp. as having been involved in transaction

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/63	Landis, J. April 27, 1976	A & A Trading Corp.	74-1-00156	Export value (Merchandise covered by invoices which specify A&A Japan, Ltd.; and A&A Japan, Ltd. or Allied Sales Corp. as having been involved in transation) Constructed value (Radios, some imported with earphones and batteries (entries 140-137, 134060, 142058, 144887, 144889)	Appraised values less amounts described as commission, purchasing agent's commission or buying commission which were included in appraised values (merchandise specified under export value) Various invoice prices, which prices do not include amounts described as commissions, purchasing agent's commissions, or buying commission and do not include 20.1% additions for the 8, 9, 10, 13 and 15 transistor radios or 9.16% additions for 6 transistor radios (merchandise specified under constructed value)	Judgment on the pleadings	Philadelphia See "Basis of Valuation" column for merchandise

R76/64	Richardson, J. May 11, 1976	The Olga Company	72-12-02636	Constructed value	Does not include cost of trips by plant manager of importer in California, to manufacturer in Mexico; findings, i.e., threads, lace, tape and elastic exported in bulk on spools, or rolls ready for assembly in exported condition, and merely cut in a foreign country entitled to deduction from constructed value of their cost under item 807.00	Summary judgment The Olga Company v. U.S. (C.D. 4468)	Calexico (San Diego) Findings (threads, lace, tape, elastic)
R76/65	Richardson, J. May 11, 1976	The Olga Company	73-2-00438	Constructed value	Does not include cost of trips by plant manager of importer in California, to manufacturer in Mexico; findings, i.e., threads, lace, tape and elastic exported in bulk on spools, or rolls ready for assembly in exported condition, and merely cut in a foreign country entitled to deduction from constructed value of their cost under item 807.00	Summary judgment The Olga Company v. U.S. (C.D. 4468)	Calexico (San Diego) Findings (threads, lace, tape, elastic)

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/66	Richardson, J. May 11, 1976	The Olga Company	73-6-01480	Constructed value	Does not include cost of trips by plant manager of importer in California, to manufacturer in Mexico; findings, i.e., threads, lace, tape and elastic exported in bulk on spools, or rolls ready for assembly in exported condition, and merely cut in a foreign country entitled to deduction from constructed value of their cost under item 807.00	Summary judgment The Olga Company v. U.S. (C.D. 4468)	Calexico (San Diego) Findings (threads, lace, tape, elastic)
R76/67	Richardson, J. May 11, 1976	The Olga Company	74-5-01352	Constructed value	Does not include cost of trips by plant manager of importer in California, to manufacturer in Mexico; findings, i.e., threads, lace, tape and elastic exported in bulk on spools, or rolls ready for assembly in exported condition, and merely cut in a foreign country entitled to deduction from constructed value of their cost under item 807.00	Summary judgment The Olga Company v. U.S. (C.D. 4468)	Calexico (San Diego) Findings (threads, lace, tape, elastic)

R76/68	Maletz, J. May 25, 1976	Drexel Motors, Inc.	R67/4567	Cost of production	DM 3716.25	Judgment on the pleadings U.S. v. F & D Trading Corp. (C.A.D. 1089)	New York Ten Model No. 113 Volkswagen automobiles
R76/69	Maletz, J, June 3, 1976	A & A International	74-3-00025	Export value	Appraised values less amounts described as commission, purchasing agent's commission or buying commission which were included in appraised values by customs	Judgment on the pleadings A & A Trading Corp. v. U.S. (C.D. 4472)	Los Angeles Electrical articles
R76/70	Watson, J. June 8, 1976	The Florsheim Shoe Co., Division of Interco.	74-3-00772	Foreign value	Appraised unit values less 1% cash discount, packed	Agreed statement of facts	Chicago Calf upper leather, kid upper leather, kid lining leather
R76/71	Richardson, J. June 17, 1976	The Olga Company	73-12-03427	Constructed value	Does not include cost of trips by plant manager of importer in California, to manufacturer in Mexico; findings, i.e., threads, lace, tape and elastic exported in bulk on spools, or rolls ready for assembly in exported condition, and merely cut in a foreign country entitled to deduction from constructed value of their cost under item 807.00; merchandise in entries 106464 and 106572 liquidated as claimed and claim dismissed as moot.	Summary judgment The Olga Company v. U.S. (C.D. 4468)	Calexico (San Diego) American goods returned (findings, i.e., thread, lace, tape and elastic); women's body supporting garments and parts thereof.

DECISION NUMBER	JUDGE & DATE OF DECISION	PLAINTIFF	COURT NO.	BASIS OF VALUATION	HELD VALUE	BASIS	PORT OF ENTRY AND MERCHANDISE
R76/72	Richardson, J. June 17, 1976	H. M. Young Associates, Inc.	R64/20788, etc.	Constructed value	Invoiced prices	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York Tapes Webbing 3¼" #7010; Cotton Waistband Elastic 7010 3¼"; Cotton Elastic Waistband 7010 3¼", etc.
R76/73	Richardson, J. June 17, 1976	H. M. Young Associates, Inc.	R65/8541, etc.	Constructed value	Invoiced prices	H. M. Young Associates, Inc. v. U.S. (C.D. 4388, aff'd C.A.D. 1138)	New York Tapes Webbing 3¼" #7010; Cotton Waistband Elastic 7010 3¼"; Cotton Elastic Waistband 7010 3¼", etc.
R76/74	Maletz, J. June 23, 1976	H. A. & J. L. Wood, Inc.	73-12-03553	Export value	Invoice values less duty or other non-dutiable charges included in said invoice value	J. L. Wood v. U.S. (C.A.D. 1130)	Pembina Engine heaters (with or without cords), car warmers, parts or accessories

R76/75	Maletz, J. June 24, 1976	Tami Sportswear, Inc.	75–10–02563	Export value	$27.50 per doz., net packed	Agreed statement of facts	San Francisco Knitted sweaters style 4748
R76/76	Maletz, J. June 24, 1976	J. L. Wood	R69/1586, etc.	Export value	Invoice values less duty or other non-dutiable charges included in said invoice value	J. L. Wood v. U. S. (C.A.D. 1139)	Pembina Engine heaters (with or without cords), car warmers, parts or accessories
R76/77	Richardson, J. June 30, 1976	Nola R. DeMeuse, Executrix, et al.	R70/688	Constructed value	$281,559.95 (correct constructed value); $166,561.57 (correct dutiable value, after adjustments for cost or value of U.S. products pursuant to item 807.00; and depreciation)	Stipulated judgment	San Diego A yacht—*Blackfin*

Rules of the United States Customs Court

Rules 3.2, 3.5 and 5.1 have been revised; Appendix B has been changed to B–1 and Summons (CC–SA1 – CC–SA2) has been amended; Appendix B–2 and a new form, Summons (CC–SA3), have been added. The revisions were effective January 19, 1976 and read as follows (revised and new language indicated by underlineation):

Rule 3.2 Commencement of Action

(a) Summons: Filing; Fee: A civil action is commenced by a party to contest (1) denial of a protest under section 515 of the Tariff Act of 1930, as amended (19 U.S.C. § 1515, as amended); (2) a decision of the Secretary of the Treasury under section 516 of the Tariff Act of 1930, as amended (19 U.S.C. § 1516, as amended); or (3) a determination by the Secretary of the Treasury under section 201 of the Antidumping Act, 1921, as amended (19 U.S.C. § 160, as amended), that a class or kind of merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or under section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303, as amended), that a bounty or grant is not being paid or bestowed, by filing a summons with the clerk of the court and by paying to him a filing fee of $5.

* * * * * * *

(d) Summons: Number of Copies:

* * * * * * *

(3) An original and 3 copies of the summons shall be filed with the clerk in an action commenced to contest a determination by the Secretary of the Treasury under section 201 of the Antidumping Act, 1921, as amended (19 U.S.C. § 160, as amended), that a class or kind of merchandise is not being, nor likely to be, sold in the United States at less than its fair value, or under section 303 of the Tariff Act of 1930, as amended (19 U.S.C. § 1303, as amended), that a bounty or grant is not being paid or bestowed.

* * * * * * *

(g) Summons: Service: Upon filing of a summons it shall be signed by the clerk under the seal of the court and the clerk shall return a copy, together with a receipt for payment of the filing fee, to the person who filed the summons, and shall make service of the summons as prescribed by subparagraphs (1), (2), and (3) of this paragraph (g).

(1) When the United States is an adverse party, except in an action commenced under section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended), the clerk shall make service of the summons: upon the Attorney General, by delivery or by mailing a copy to the Chief, Customs Section, Department of Justice; and upon the Secretary of the Treasury, by delivery or by mailing a copy to the Assistant Chief Counsel for Customs Litigation, Bureau of Customs,* and by delivery or by mailing a copy to the district director for the customs district in which the protest was denied, or, in which the liquidation of an entry is contested under section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended).

(2) When a civil action is commenced to contest a decision of the Secretary of the Treasury under section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended), the clerk shall also deliver or mail a copy of the summons to the consignee or agent of the consignee involved in each entry which is the subject of the civil action.

(3) When the United States is an adverse party in an action commenced under section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended), the clerk shall make service of the summons upon the persons named in subparagraph (1) of this paragraph (g) with the exception of the district director.

(h) Documents Furnished in an Action Other Than One Commenced Under 19 U.S.C. § 1516(d), as Amended: * * *

* * * * * * *

(i) Documents Furnished in an Action Commenced Under 19 U.S.C. § 1516(d), as Amended: Upon service of the summons in an action commenced under section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended), on the Secretary of the Treasury, he, or his designee, shall, in accordance with 28 U.S.C. § 2632(g), as amended, forthwith transmit the following items, if they exist, to the court as part of the official record of the civil action:

(1) a certified copy of the transcript of any hearing held by the Secretary in the particular proceeding which resulted in the challenged determination; and

(2) a certified copy of all notices, determinations, or other matters which the Secretary has caused to be published in the Federal Register

*Any reference in the Rules of the United States Customs Court to the Bureau of Customs should be understood as a reference to the United States Customs Service.

in connection with the particular proceeding described in subparagraph (1) of this paragraph (i).

Rule 3.5 Summons by American Manufacturers, Producers, or Wholesalers: Form and Content

(a) Form and Content of Summons in a Civil Action Arising Under 19 U.S.C. § 1516(c), as Amended: General: A summons in a civil action commenced to contest a decision of the Secretary of the Treasury under section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended) shall be substantially in the form as shown in Appendix B–1 and shall set forth:

* * * * * * *

(d) Nonassessment of Countervailing or Antidumping Duties: When the decision contested is the Secretary of the Treasury's failure to assess countervailing or antidumping duties, the summons shall so indicate.

(e) Form and Content of Summons in a Civil Action Arising Under 19 U.S.C. §1516(d), as Amended: General: A summons in a civil action commenced to contest a determination by the Secretary of the Treasury under section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended) shall be substantially in the form as shown in Appendix B–2 and shall set forth:

(1) the name and status of the plaintiff;

(2) a brief description of the contested determination by the Secretary of the Treasury;

(3) the date of such determination by the Secretary of the Treasury;

(4) the date of filing with the Secretary of the Treasury the plaintiff's written notice of a desire to contest such determination;

(5) the date of publication by the Secretary of the Treasury of the notice of a desire to contest such determination;

(6) the name, signature, post office address, and telephone number of the attorney filing the summons or of the individual filing the summons in his own behalf.

Rule 5.1 American Manufacturers, Producers, or Wholesalers; Practice

(a) Party in Interest: A party in interest in an action filed under section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended) shall be deemed to be a defendant for the purposes of the application of these rules to that action.

APPENDIX B–1

FORM OF SUMMONS IN ACTIONS, UNDER 19 U.S.C. § 1516(c), BY AMERICAN MANUFACTURERS, PRODUCERS, OR WHOLESALERS

INSTRUCTIONS FOR USE

The summons consists of a first page (CC–SA1), setting forth identifying information concerning the entry involved in the action, and a second page (CC–SA2), setting forth relevant information concerning the decision contested in the action.

An original and 5 copies of the summons shall be filed when the action includes entries involving only one consignee and only one port of entry.

When, under the circumstances permitted by these rules, the action includes entries involving more than one consignee or more than one port of entry, an additional copy of the summons shall be filed at the same time for each such different consignee and for each such different port of entry.

Amendments to Summons (CC–SA1 – CC–SA2):

(1) Add "(c)" in two places in the paragraph at the top of the form (CC–SA1). The paragraph now reads:

PLEASE TAKE NOTICE that a civil action has been commenced to contest a decision of the Secretary of the Treasury made pursuant to section 516(c) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(c), as amended).

(2) Delete "PROTEST" before "CLAIM" under headings "STATUTORY BASIS" and "CLASSIFICATION AND RATE" from the second page of the Summons (CC–SA2).

Printed below is the new appendix:

APPENDIX B–2

FORM OF SUMMONS IN ACTIONS, UNDER 19 U.S.C. § 1516(d), BY AMERICAN MANUFACTURERS, PRODUCERS, OR WHOLESALERS

INSTRUCTIONS FOR USE

The summons consists of a single page (CC–SA3), setting forth identifying information concerning the determination by the Secretary of the Treasury contested in the action.

An original and 3 copies of the summons shall be filed.

And the new summons form (CC–SA3) follows:

UNITED STATES CUSTOMS COURT

----------x

Plaintiff,

v. : **SUMMONS**

UNITED STATES, :

Defendant.

----------x

TO: The Attorney General and the Secretary of the Treasury:

PLEASE TAKE NOTICE that a civil action has been commenced to contest a determination by the Secretary of the Treasury made pursuant to section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended).

Clerk of the Court

1. _____

(Status of plaintiff)

2. _____

(Brief description of contested determination by the Secretary of the Treasury)

3. _____

(Date of the determination by the Secretary)

4. _____

(Date of filing with the Secretary of plaintiff's written notice of desire to contest such determination)

5. _____

(Date of publication by Secretary of notice of desire to contest such determination)

6. _____

(Name, signature, post office address, and telephone number of attorney filing summons or the individual filing summons in his own behalf)

(CC–SA3)

And the new summons form (CC-SA3) follows:

UNITED STATES CUSTOMS COURT

x

Plaintiff,

v. : SUMMONS

UNITED STATES,

Defendant.

x

TO: The Attorney General and the Secretary of the Treasury:

PLEASE TAKE NOTICE that a civil action has been commenced to contest a determination by the Secretary of the Treasury made pursuant to section 516(d) of the Tariff Act of 1930, as amended (19 U.S.C. § 1516(d), as amended).

Clerk of the Court

---

1. (Status of plaintiff)

2. (Brief description of contested determination by the Secretary of the Treasury)

3. (Date of the determination by the Secretary)

4. (Date of filing with the Secretary of plaintiff's written notice of desire to contest such determination)

5. (Date of publication by Secretary of notice of desire to contest such determination)

6. (Name, signature, post office address, and telephone number of attorney filing summons or the individual filing summons in his own behalf)

(CC-SA3)

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ROTARY FILES
Certain rotary burs were classified as cutting tools, under item 649.43, Tariff Schedules of the United States, and were claimed to be classifiable as rotary files, under TSUS item 649.41.
The court held that the imported rotary burs performed the same basic functions as rotary files, were essentially a type of file for tariff classification purposes, and, consequently, were properly dutiable under item 649.41, irrespective of the method used for forming the cutting ridges or teeth of the tool. Accordingly, the claim of the plaintiff was sustained. *Dollar Trading Corp.*, C.D. 4628 11
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DUTIABLE WEIGHT (*see* CHERRIES IN SYRUP, C.D. 4646).
GLACE FRUITS
Certain cherries packed in syrup and imported in drums were classified as glace fruits at the duty rate of 7 cents per pound and 10 per centum *ad valorem*. The total weight of cherries and syrup combined was utilized in the assessment of the specific rate of duty. Plaintiff contended that the specific duty should have been assessed only on the net weight of the cherries exclusive of any syrup or packing medium.
Based on the testimony of industry witnesses, which established that the syrup preserved the cherries and protected them from crushing during transportation, that the syrup was discarded when the cherries were removed for processing in the United States and was not known to have any further commercial use, the court held that the imported merchandise was not subject to the specific duty on the weight of the syrup. Accordingly, the allegations in the complaint were sustained. *California Processed Fruit Co.*, C.D. 4646 137
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Merchandise described on the invoices as Gianduja Sweet Chocolate Coating was classified as confectioners' coatings, under item 156.47, Tariff Schedules of the United States, and was claimed to be classifiable as sweetened chocolate in bars or blocks weighing 10 pounds or more, under TSUS item 156.25.
Finding from the evidence that the ingredients utilized in the manufacture of the imported coatings, with the exception of the hazelnut butter, identified more readily with those specified in the statutory definition of chocolate than with the standards for confectioners' coatings, and that the hazelnut butter, added as a flavoring agent as permitted by the chocolate definition, was in liquid form and intermixed with and dispersed throughout the other ingredients to flavor the mixture, the court held that the imported coatings were properly classifiable as sweetened chocolate under item 156.25. Accordingly, plaintiff's claim was sustained. *Rockwell Import Corporation*, C.D. 4664--- 262
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Sec. 153.56 (*see* PROPER PARTY PLAINTIFF, C.D. 4658).
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Rule 8.2(b)
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1890, sec. 2 par. 674 (*see* TREATY, ABROGATION OF, C.D. 4629).
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PAPIER-MACHE FIGURES
Certain papier-mache figures were classified as dolls under item 737.20, Tariff Schedules of the United States, and were claimed to be classificable as articles of papier-mache, not specially provided for, under TSUS item 256.75.
The court held that the provision in the tariff schedules covering dolls is an *eo nomine* rather than a use provision and covers all forms of the article; that a doll for tariff purposes is not confined to toys or playthings for children but includes a wide range of other articles including but not limited to dolls for ornamentation, souvenir or prize dolls, dolls for display, advertising purposes, and dolls sold as gag items, adult novelties, etc., and that the imported papier-mache figures consisting of miniature figures of small girls coyly posed in an amusing manner, with various inscriptions taped thereon, were properly classified as dolls. Accordingly, plaintiff's claim was overruled. *Russ Berrie & Co., Inc.*, C.D. 4659 218
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Automobile part (*see* FABRICATED COMPONENTS, C.D. 4652).
Part, automotive (*see* FABRICATED COMPONENTS, C.D. 4652).
COMPONENTS; HOSE
Certain air-brake hose was classified as hose and tubing of rubber or plastics under item 772.65, Tariff Schedules of the United States, and was claimed to be classifiable as a Canadian article and original motor vehicle equipment under TSUS item 772.66, free of duty.
The only issue presented to the court in this case was whether the imported hose was a "fabricated component" within the meaning of headnote 2(a), part 6B, schedule 6 of the tariff schedules. The court held that the hose was a fabricated component rather than a material; that the term "fabricated components" includes all elements that go into the final article which meet the conditions the statutory provision imposes; that the hose met all the conditions of headnote 2(a), *supra*, and was thus a "fabricated component"; that the fact that the hose was imported in bulk on reels and then cut to length did not change the state of the fabrication of the hose; and that in the Automotive Products Trade Act of 1965, Congress intended the term "fabricated component" to be an inclusive terms of far wider application than an automotive "part." Accordingly, the claim of the plaintiffs for free entry was sustained. *John V. Carr & Son, Inc.* and *Paccar Inc., d/b/a Dynacraft Company*, C.D. 4652 162
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76–31
FAILURE OF PLAINTIFF TO PRESENT ESSENTIAL FACTS IN PRIOR ACTION (*see* RES JUDICATA, C.D. 4663).
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FEEDSTUFFS
MIXED FEEDS (*see* PELLETS, GRAIN SCREENING, C.D. 4649).
FIBERSCOPE
ELECTRO-MEDICAL APPARATUS AND PARTS
Certain merchandise described as "Olympus Upper GI Photofiberscope, Model GIF–D, without CLE and FIT," was classified as a medical-optical instrument and appliance, under item 709.05, Tariff Schedules of the United States, and was claimed to be classifiable as an electro-medical apparatus and parts thereof, under TSUS item 709.17.
On the record presented the court held that the imported merchandise was "more than" a medical-optical instrument and appliance, and in view of defendant's admission in the pleadings that if the court found that the subject merchandise did not consist of optical instruments or apparatus, or parts thereof, said merchandise was properly provided for within the provisions of item 709.17, that plaintiff's burden of proof with respect to its claimed classification had been fully satisfied and was no longer in issue. Accordingly, the claim of the plaintiff was sustained. *Ataka America, Inc.*, C.D. 4637 70
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76–17
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MORE THAN MEDICAL-OPTICAL INSTRUMENT AND APPLIANCE (*see* FIBERSCOPE, C.D. 4637).

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PAPIER-MACHE; ARTICLES OF PAPIER-MACHE, NOT SPECIALLY PROVIDED FOR (*see* DOLLS, C.D. 4659).

PLASTIC HORSE; TOY FIGURES OF ANIMATE OBJECTS

Certain plastic figures were classified as toy figures of animate objects, under item 737.40, Tariff Schedules of the United States, and were claimed to be classifiable as figurines of plastics, under TSUS item 773.10.

The court found that the evidence presented by the plaintiff failed to establish that the involved horses were not chiefly used for the amusement of children or adults, and therefore had failed to negate the chief use attaching by virtue of the presumption of correctness. Accordingly, the protest was overruled and the classification sustained. *Artmark Chicago, Ltd.*, C.D. 4654 187

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FIGURINES OF PLASTIC

PLASTIC HORSE FIGURES (*see* FIGURES, PLASTIC HORSE, C.D. 4654).

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FLOWERS, CARVED IVORY

JEWELRY OR PARTS THEREOF

Certain carved ivory flowers were classified as jewelry or parts thereof, under item 740.38, Tariff Schedules of the United States, and were claimed to be classifiable as semiprecious stones, under TSUS item 520.39.

On the record presented, the court found that the plaintiffs had failed to prove that the tariff term "semiprecious stones" had a common or commercial meaning which would include carved ivory flowers used as parts of jewelry. Accordingly, the classification under the provision for jewelry was sustained. *Finn Bros., Inc., Brehm Importing Co.* and *C. Rosenbach Co.*, C.D. 4647 141

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GLACE FRUITS (*see* CHERRIES IN SYRUP, C.D. 4646).
GLOVES
MOTOCROSS; GLOVES SPECIALLY DESIGNED FOR USE IN SPORTS
Certain motocross gloves were classified as leather, seamed, unlined men's gloves, not seamed wholly or in part by hand, valued over $20 per dozen pairs, under item 705.50, Tariff Schedules of the United States, and were claimed to be classifiable as gloves specially designed for use in sports, under TSUS item 735.05.
On the record presented, the court held that the plaintiff had proved that the imported gloves were specially designed for use in sports, specifically the sport of motocross, and therefore they were excluded from classification under item 705.50 of the tariff schedules by virtue of schedule 7, part 1, subpart C, headnote 1(a). Accordingly, the protests were sustained. *David E. Porter*, C.D. 4641 — 97
SPECIALLY DESIGNED FOR USE IN SPORTS (*see* GLOVES, MOTOCROSS, C.D. 4641).
GRAIN
PRODUCTS; BARLEY, OTHER (*see* PEARL BARLEY, C.D. 4631).
SCREENING PELLETS; BYPRODUCTS OBTAINED FROM MILLING OF GRAINS, MIXED FEEDS, AND MIXED-FEED INGREDIENTS (*see* PELLETS, GRAIN SCREENING, C.D. 4649).
HAZELNUT BUTTER
FLAVORING AGENT (*see* CHOCOLATE, SWEETENED, C.D. 4664).
HEAD-UP DISPLAY SYSTEM
OPTICAL ELEMENTS (*see* NAVIGATIONAL INSTRUMENT, C.D. 4656).
HOSE
AND TUBING OF RUBBER OR PLASTICS; HOSE (*see* FABRICATED COMPONENTS, C.D. 4652).
CANADIAN ARTICLE AND ORIGINAL MOTOR VEHICLE EQUIPMENT (*see* FABRICATED COMPONENTS, C.D. 4652).
FITTINGS
CHIEF USE IN HOUSEHOLD NOT ESTABLISHED (*see* HOSE FITTINGS, C.D. 4662).
PARTS OF HOSES (*see* HOSE FITTINGS, C.D. 4662).
Zinc not more specifically provided for, articles of
Certain hose couplings and menders were classified as articles of zinc not more specifically provided for elsewhere in the tariff schedules, under item 657.80, Tariff Schedules of the United States, and certain adjustable hose clamps and sink strainer bases were classified as articles of iron or steel not more specifically provided for elsewhere in the tariff schedules, under TSUS item 657.20. Plaintiff claimed that the hose fittings were properly classifiable as household articles of metal, and parts thereof, under TSUS item 653.95 or 654.20, depending upon the component material of chief value, and that the sink strainer bases were properly classifiable as sanitary wares and parts thereof, under TSUS item 653.95.
The court held that the record presented established that at the time of importation the involved hose fittings (couplings, menders and clamps) were used in the United States for industrial water and air hoses as well as for household hoses, and that plaintiff had failed in its burden of proof under items 653.95 and 654.20 to establish that the fittings were chiefly used in the household; that the evidence showed that the strainer bases were dedicated solely to use in sinks; that they became a permanent part of the sink after installation; that they served an essential function in receiving and directing the flow of the waste water from the fixture into the drainage and waste system to which they were connected; and that a sink would be incomplete and could not operate effectively to discharge water into the drainage system without a device such as a strainer base. Accordingly, plaintiff's claim under 653.95 with respect to the sink strainer bases was sustained, and its claims under items 653.95 and 654.20 with respect to the hose fittings were dismissed. *Hancock Gross, Inc.*, C.D. 4662 — 237

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HOUSEHOLD ARTICLES
CHIEF USE (*see* HOSE FITTINGS, C.D. 4662).
OF METAL (*see* HOSE FITTINGS, C.D. 4662).
IDENTICAL ISSUE IN PRIOR CASE (*see* RES JUDICATA, C.D. 4663).
IMITATION PATENT LEATHER (*see* POLYURETHANE SHEET WITH NYLON BACKING, C.D. 4626).
INSPECTION LIGHTS
FLASHLIGHTS

Certain articles consisting of plastic battery and switch case and metal cap with gooseneck extension and lamp socket were classified as flashlights, under item 683.70, Tariff Schedules of the United States, and were claimed to be classifiable as other portable electric lamps, under TSUS item 683.80.

The court held that the evidence established that after importation the imported articles were assembled, equipped with a lens-end type bulb, and sold to purchasers who supplied "C" type batteries and used them as inspection lights in small, inaccessible areas, and were within the broad, nonuse oriented common meaning of the term "flashlight," which is, a small, battery operated, portable electric light, and were *eo nomine* provided for in item 683.70. Accordingly, the action was dismissed. *Air-Sea Forwarders, Inc.*, C.D. 4665 ---------- 268

INTERCHANGEABLE TOOLS
ROTARY FILES (*see* BURS, ROTARY, C.D. 4628).
INTERNEGATIVE PRINTERS
ENLARGERS AND CAMERA-ENLARGERS, OTHER (*see* PRINTERS, INTERNEGATIVE, C.D. 4661).
IRON
FRAGMENTS; CHEMICAL ELEMENTS IN ANY PHYSICAL FORM

Certain iron fragments were classified as articles of iron, under item 657.20, Tariff Schedules of the United States, and were claimed to be classifiable as chemical elements in any physical from, under TSUS item 415.50, or alternatively, as any article not provided for elsewhere in the schedules, under TSUS item 799.00.

The court held that the imported merchandise was not dutiable as classified inasmuch as it was not an "article" of iron but iron in a primary form although not provided for under Part 2B of TSUS Schedule 6, but that it was dutiable as claimed under item 415.50 inasmuch as it was a chemical element in any physical form which was not excluded from such classification by headnote 1(iii) of TSUS Schedule 4 because the exclusionary language is directed only to the metals actually provided for under Part 2 of TSUS Schedule 6. Accordingly, plaintiff's claim was sustained. *A. Johnson & Co., Inc.*, C.D. 4650 ---------- 155
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76–29

OR STEEL NOT MORE SPECIALLY PROVIDED FOR, ARTICLES OF; SINK STRAINER BASES (*see* HOSE FITTINGS, C.D. 4662).
POWDER
Powders, other (*see* IRON POWDER, C.D. 4635).
Sponge iron powder

Certain iron powder, described as Atomet 28, was classified as "other powders" under item 608.05, Tariff Schedules of the United States, and was claimed to be classifiable as sponge iron powder under TSUS item 608.02.

The court held that the evidence established that the imported merchandise was a porous iron powder which should be classified as sponge iron powder as recommended by Government chemists, and that the classification of the imported merchandise could not properly be influenced by the Government's reference to a "mixed powder" composition of the merchandise inasmuch as this reference was based upon an erroneous interpretation of a witness' "mixed particles" observation of characteristics exhibited by a sponge iron powder. Accordingly, the claim of the plaintiff was sustained. *F. W. Myers & Co., Inc.*, C.D. 4635 ---------- 51

JEWELRY
ARTICLES POSSESSING ESSENTIAL PARTS; UNFINISHED JEWELRY (*see* FLOWERS, CARVED IVORY, C.D. 4647).
OR PARTS THEREOF (*see* FLOWERS, CARVED IVORY, C.D. 4647).

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JUDGMENT
DISMISSING PROTEST
Final and conclusive (*see* RES JUDICATA, C.D. 4663).
For lack of prosecution; collaterally, may not be attacked (*see* RES JUDICATA, C.D. 4663).
OF DISMISSAL BASED ON LACK OF PROSECUTION FINAL AND CONCLUSIVE; REHEARING OR TO APPEAL, FAILURE TO MOVE FOR (*see* RES JUDICATA, C.D. 4663).
JUDICIAL NOTICE
CHIEF USE (*see* HOSE FITTINGS, C.D. 4662).
USE OF "BLINKER" LANTERNS FOR EMERGENCY SIGNALLING (*see* LANTERNS, BLINKER, C.D. 4643).
JURISDICTION
MOTION TO DISMISS FOR LACK OF; UNTIMELY PROTEST (*see* PROTEST UNTIMELY, C.D. 4657).
OF COURT; SUMMONS, FILING AS OF DATE OF POSTMARK (*see* RULE 3.2(b) OF THE COURT, VALIDITY OF, C.D. 4651).
PRESIDENTIAL PROCLAMATION, PROTEST AGAINST LIQUIDATION BASED UPON A VOID (*see* RES JUDICATA, C.D. 4663).
KITS, ELECTRIC TRAVEL BEAUTY
ENTIRETY (*see* KITS, ELECTRIC TRAVEL BEAUTY, C.D. 4642).
MIRRORS
Certain merchandise, described as "Electric Travel Beauty Kits," was classified as mirrors, under item 544.51, Tariff Schedules of the United States, and was claimed to be classifiable as an entirety under TSUS item 688.40, as electrical articles, and electrical parts of articles, not specially provided for. Plaintiff filed a motion for summary judgment pursuant to rule 8.2 of the court, and defendant cross-moved for summary judgment.
From the statement of material facts filed by the respective parties, the court found that no genuine issue of fact existed which precluded it from making a determination of the case upon the motion and cross-motion for summary judgment as submitted. In holding that plaintiff had failed to sustain its burden of proof of showing that the classification of the customs official was erroneous, the court rejected plaintiff's claims that the imported merchandise was "more than" a mirror and that a sample kit in evidence was a potent witness. Accordingly, the cross-motion of the defendant was granted and the plaintiff's motion was denied. *The Englishtown Corporation*, C.D. 4642---------- 107
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76-24
LACHES
PLAINTIFF ESTOPPED BY ITS OWN ACTIONS TO ATTACK PRIOR JUDGMENT (*see* RES JUDICATA, C.D. 4663).
LACK OF PROSECUTION
MOTION TO DISMISS FOR (*see* PROPER PARTY PLAINTIFF, C.D. 4658).
PROTEST DISMISSED (*see* RES JUDICATA, C.D. 4663).
LANTERNS, BLINKER
ELECTRICAL ARTICLES, NOT SPECIALLY PROVIDED FOR
Certain "blinker" lanterns were classified as portable electric lamps, under item 683.80, Tariff Schedules of the United States, and were claimed to be classifiable as electrical articles not specially provided for, under TSUS item 688.40.
The court held that the involved "blinker" lanterns were portable battery-operated combination articles comprised of a searchlight portion for illumination and an automatic signal-warning red flasher for emergency signalling; that the imports served two independent and coequal functions, as a searchlight and as a signal-warning flasher; that the latter function was not incidental, auxiliary or subordinate to the searchlight function; and that therefore the "blinger" lanterns were "more than" the portable electric lamps covered by item 683.80, as classified, and were properly dutiable as electrical articles not specially provided for under item 688.40, as claimed. Accordingly, the protests were sustained. *The Ashflash Corporation*, C.D. 4643---------- 112
"MORE THAN" PORTABLE ELECTRIC LAMPS (*see* LANTERNS, BLINKER, C.D. 4643).

LEATHER Page
IMITATION PATENT
"Almost wholly of" plastic (*see* POLYURETHANE SHEET WITH NYLON BACKING, C.D. 4626).
SEAMED, UNLINED MEN'S GLOVES; MOTOCROSS GLOVES (*see* GLOVES, MOTOCROSS, C.D. 4641).
LEGISLATIVE HISTORY
BRUSSELS NOMENCLATURE, 1955 (*see* FIBERSCOPE, C.D. 4637).
HOUSE REPORT
No. 4728, 75th Cong., 1st Sess. (1937) (*see* TRACTORS, FOUR-WHEELED, C.D. 4634).
No. 537, 89th Cong., 1st Sess. (1965) (see FABRICATED COMPONENTS, C.D. 4652).
SUMMARIES OF TARIFF INFORMATION, 1948, VOL. 4 (*see* PANELS, WOODEN, C.D. 4636).
SUMMARIES OF TRADE AND TARIFF INFORMATION (TSUS)
1966, Schedule 1, Vol. 6 (*see* PEARL BARLEY, C.D. 4631).
1967 (*see* IRON POWDER, C.D. 4635).
1968
Schedule 2, Vol. 2 (*see* PANELS, WOODEN, C.D. 4636).
Schedule 6, Vol. 6 (*see* BURS, ROTARY, C.D. 4628).
1969, Schedule 1, vol. 9 (*see* CHOCOLATE, SWEETENED, C.D. 4664).
TARIFF CLASSIFICATION STUDY, 1960, EXPLANATORY AND BACKGROUND MATERIALS
Schedule 1 (*see* CHOCOLATE, SWEETENED, C.D. 4664).
Schedule 4 (*see* N-METHYL GLUCAMINE, C.D. 4630).
Schedule 6 (*see* IRON FRAGMENTS, C.D. 4650).
Schedule 7
(*see* PRINTERS, INTERNEGATIVE, C.D. 4661).
(*see* NAVIGATIONAL INSTRUMENT, C.D. 4656).
LEGISLATIVE INTENT
WOOD SCREENS (*see* PANELS, WOODEN, C.D. 4636).
LEGISLATIVE RATIFICATION OF JUDICIAL INTERPRETATION
CHAIR (*see* VALETS WITH SEATS AND VALET STANDS, C.D. 4638).
LIGHTS, INSPECTION
PORTABLE ELECTRIC LAMPS, OTHER (*see* INSPECTION LIGHTS, C.D. 4665).
LIKE FURNISHINGS
COVERS, SUIT AND TRANSPARENT (*see* SUIT AND TRANSPARENT COVERS, C.D. 4645).
EJUSDEM GENERIS (*see* SUIT AND TRANSPARENT COVERS, C.D. 4645).
LIQUIDATION
BASED UPON A VOID PRESIDENTIAL PROCLAMATION; PROTEST, TIMELINESS OF (*see* RES JUDICATA, C.D. 4663).
VOID; PROTEST, PREMATURE FILING OF (*see* RES JUDICATA, C.D. 4663).
MANNER OF SALE NOT NECESSARILY DETERMINATIVE OF CLASSIFICATION
CHIEF USE (*see* FIGURES, PLASTIC HORSE, C.D. 4654).
MEDICAL-OPTICAL INSTRUMENT (*see* FIBERSCOPE, C.D. 4637).
MIRROR
"MORE THAN," NOT (*see* KITS, ELECTRIC TRAVEL BEAUTY, C.D. 4642).
MIRRORS (*see* KITS, ELECTRIC TRAVEL BEAUTY, C.D. 4642).
MIXED
FEEDS; FEEDSTUFFS (*see* PELLETS, GRAIN SCREENING, C.D. 4649).
PARTICLES; SPONGE IRON POWDER (*see* IRON POWDER, C.D. 4635).
MONOMETHYL MONOAMINE (*see* N-METHYL GLUCAMINE, C.D. 4630).
MORE THAN
MEDICAL-OPTICAL INSTRUMENT AND APPLIANCE (*see* FIBERSCOPE, C.D. 4637).
NOT; MIRROR (*see* KITS, ELECTRIC TRAVEL BEAUTY, C.D. 4642).
PHONOGRAPHS; VOICE UNITS (*see* TOYS, NOT SPECIALLY PROVIDED FOR, PARTS OF, C.D. 4639).
PORTABLE ELECTRIC LAMPS (*see* LANTERNS, BLINKER, C.D. 4643).

MOTION TO DISMISS FOR LACK OF JURISDICTION (*see* PROTEST UNTIMELY, C.D. 4657). Page

MOTOCROSS GLOVES

LEATHER, SEAMED, UNLINED MEN'S GLOVES (*see* GLOVES, MOTOCROSS, C.D. 4641).

SAMPLE A POTENT WITNESS (*see* GLOVES, MOTOCROSS, C.D. 4641).

NAVIGATIONAL INSTRUMENT

OPTICAL INSTRUMENT

Certain merchandise described on the invoice as "Navigation system type 193 No. 10," was classified as other optical appliances and instruments, under item 708.89, Tariff Schedules of the United States. Plaintiff claimed that the merchandise was properly classifiable as other parts of aircraft under TSUS item 694.60, or, alternatively, as other navigational instruments and parts thereof, under TSUS item 710.46, or, alternatively, as other optical navigational instruments, under TSUS item 710.08.

The court held that the imported merchandise which consisted of collimating head, electronic box, and two control boxes, having the capacity, when installed in an airplane and coupled to the plane's sensors, of directing the flight of the aircraft from point of take-off to point of landing and along a predetermined course of flight by receiving the input from the sensors and converting electrical signals into mechanical signals and flight data images which images are then projected onto a reflecting glass for viewing by the pilot, were properly classifiable as claimed under item 710.46 as a navigational instrument and not under 708.89 as an optical instrument as classified inasmuch as the optical elements incorporated in the navigational device performed only secondary, subsidiary functions. Accordingly, plaintiff's claim was sustained. *Librascope Div. of Singer-General Precision, Inc.*, C.D. 4656 197

NITROGENOUS COMPOUNDS, OTHER

CHEMICALS (*see* N-METHYL GLUCAMINE, C.D. 4630).

N-METHYL GLUCAMINE

MONOMETHYL MONOAMINE (*see* N-METHYL GLUCAMINE, C.D. 4630).

NITROGENOUS COMPOUNDS, OTHER

A compound commonly called N-methyl glucamine was classified as other nitrogenous compounds, under item 425.52, Tariff Schedules of the United States, and was claimed to be classifiable as a monomethyl monoamine under TSUS item 425.20. Plaintiff filed a motion for judgment on the pleadings and defendant filed a cross-motion for summary judgment. The same issue, involving the same merchandise, was decided in favor of the plaintiff in *Rhodia, Inc.* v. *United States*, 69 Cust. Ct. 19, C.D. 4366 (1972).

The court found that the information presented to it in support of the motions was more complete and well rounded than that presented in the prior *Rhodia* case, as a result of which the court was convinced that the conclusion reached in said case was erroneous, and held that the imported merchandise was properly classified by the appropriate customs officer under item 425.52. Accordingly, plaintiff's motion was denied, defendant's motion was granted, and all claims of plaintiff were overruled and dismissed with prejudice. *Rhodia, Inc.*, C.D. 4630 31

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76–14

"OF" TEXTILE MATERIALS

POLYURETHANE MATERIAL (*see* POLYURETHANE SHEET WITH NYLON BACKING, C.D. 4626).

OPTICAL

ELEMENTS

Head-up display system (*see* NAVIGATIONAL INSTRUMENT, C.D. 4656).

Of navigational device; subsidiary functions (*see* NAVIGATIONAL INSTRUMENT, C.D. 4656).

INSTRUMENT (*see* NAVIGATIONAL INSTRUMENT, C.D. 4656).

OTHER Page
FABRICS OF TEXTILE MATERIALS OF MAN-MADE FIBERS, COATED OR LAMINATED WITH PLASTIC (*see* POLYURETHANE SHEET WITH NYLON BACKING, C.D. 4626).
FEEDSTUFFS; EJUSDEM GENERIS (*see* PELLETS, GRAIN SCREENING, C.D. 4649).
OWNER'S DECLARATION FILED, NO
PLAINTIFF, PROPER PARTY (*see* PROPER PARTY PLAINTIFF, C.D. 4658).
PANELS, WOODEN
WOOD SCREENS
Certain hand carved wooden panels were classified as wood screens under item 206.67, Tariff Schedules of the United States, and were claimed to be classifiable as articles not specially provided for, of wood.
On the record presented the court held that the imported merchandise was screens within the legislative intendment of item 206.67 covering wood screens, an *eo nomine* provision as revealed by an examination of the summaries of tariff information; that the lexicographic sources also established that the term "screens" included decorative screens; that the blending of a utilitarian and decorative function in an imported article did not remove it from the category which described it *eo nomine;* and that the *eo nomine* provision for wood screens included all forms of screens. Accordingly, the protests were overruled.
W & J Sloane, Inc., C.D. 4636 ---------- 62
PAPIER-MACHE FIGURES (*see* DOLLS, C.D. 4659).
PART, AUTOMOTIVE
FABRICATED COMPONENT (*see* FABRICATED COMPONENTS, C.D. 4652).
PARTS OF
ENLARGERS AND CAMERA-ENLARGERS, OTHER; PRINTERS, PARTS OF INTERNEGATIVE (*see* PRINTERS, INTERNEGATIVE, C.D. 4661).
HOSES (*see* HOSE FITTINGS, C.D. 4662).
INTERNEGATIVE PRINTERS; ELECTRICAL ARTICLES AND ELECTRICAL PARTS OF ARTICLES, NOT SPECIALLY PROVIDED FOR (*see* PRINTERS, INTERNEGATIVE, C.D. 4661).
SANITARY WARES
(SINKS); DEDICATION TO USE (*see* HOSE FITTINGS, C.D. 4662).
STRAINER BASES, SINK (*see* HOSE FITTINGS, C.D. 4662).
PATENT CLASSIFICATION
TARIFF CLASSIFICATION (*see* TOYS, NOT SPECIALLY PROVIDED FOR, PARTS OF, C.D. 4639).
PEARL BARLEY
BARLEY, OTHER
Certain grain, invoiced as "quick cooking pearl barley," was classified as milled "barley: other" fit for human consumption, under item 131.12, Tariff Schedules of the United States. Plaintiff claimed that the merchandise was classifiable as "pearl barley" under TSUS item 131.10, or, alternatively, as "cereal breakfast foods and similar cereal preparations," under TSUS item 182.30.
The court held that under the doctrine of *stare decisis*, the holding of the court in the prior case of *M. L. de Lange* v. *United States*, 62 Cust. Ct. 17, C.D. 3665, 294 F. Supp. 646 (1969), involving the same merchandise and plaintiff-importer, that plaintiff's contention that the standard for pearl barley is one which includes barley in various shapes and is not limited to barley having a ball shape was dispositive of plaintiff's primary claim; and that the alternative claim was without merit for failure of plaintiff to discharge his burden of proof. Accordingly, the protests were overruled. *M. L. de Lange*, C.D. 4631 ---------- 33
Rehearing motion denied March 19, 1976
COMMON MEANING (*see* PEARL BARLEY, C.D. 4631).
STARE DECISIS (*see* PEARL BARLEY, C.D. 4631).

PELLETS, GRAIN SCREENING — Page

ANIMAL FEEDS AND INGREDIENTS THEREFOR, NOT SPECIALLY PROVIDED FOR

Certain grain screening pellets used as animal feed were classified as animal feeds, and ingredients therefor, not specially provided for, under item 184.75, Tariff Schedules of the United States, and were claimed to be classifiable as animal feeds, and ingredients therefor, not specially provided for: byproducts obtained from the milling of grains, mixed feeds, and mixed-feed ingredients, under TSUS item 184.70.

The court found that headnote 1(b) of schedule 1, part 15, subpart C requires that a mixed feed consist of an admixture of grains (or products, including byproducts obtained in the milling of grains) with molasses, oil cake, oil-cake meal or other feedstuffs and that the grain content weigh no less than 6% of the mixed feed, that the imported pellets, though made of byproducts from the cleaning of various types of grain, contained neither molasses, oil cake or oil-cake meal, that the testimony and exhibits failed to establish that the one other component, "LLS," was not a feedstuff but a binding agent used to bind the pellet and make it more firm, and therefore the imported pellets were not classifiable as claimed by plaintiff. Accordingly, the claim of the plaintiff was overruled. *American Customs Brokerage Co., Inc., a/c Albers Milling Company*, C.D. 4649 ---------- 146

PERSONAL GOODS AND EFFECTS

DUTY, EXEMPTION FROM (*see* TREATY, ABROGATION OF, C.D. 4629).

PHONOGRAPH

COMMON MEANING (*see* TOYS, NOT SPECIALLY PROVIDED FOR, PARTS OF, C.D. 4639).

PHONOGRAPHS

VOICE UNITS (*see* TOYS, NOT SPECIALLY PROVIDED FOR, PARTS OF, C.D. 4639).

PHOTOGRAPHIC EQUIPMENT

EQUIPMENT SPECIALLY DESIGNED FOR PHOTOFINISHING STILL PICTURES (*see* PRINTERS, INTERNEGATIVE, C.D. 4661).

PLAINTIFF

ESTOPPED BY ITS OWN ACTIONS TO ATTACK PRIOR JUDGMENT; LACHES (*see* RES JUDICATA, C.D. 4663).

PROPER PARTY

Owner's declaration filed, no (*see* PROPER PARTY PLAINTIFF, C.D. 4658).

PROSECUTION, MOTION TO DISMISS FOR LACK OF (*see* PROPER PARTY PLAINTIFF, C.D. 4658).

PLASTIC HORSE FIGURES

FIGURINES OF PLASTICS (*see* FIGURES, PLASTIC HORSE, C.D. 4654).

PLEADINGS, MOTION FOR JUDGMENT ON THE

SUMMARY JUDGMENT, CROSS-MOTION FOR (*see* N-METHYL GLUCAMINE, C.D. 4630).

POLYURETHANE

MATERIAL; "OF" TEXTILE MATERIALS (*see* POLYURETHANE SHEET WITH NYLON BACKING, C.D. 4626).

SHEET WITH NYLON BACKING; FLEXIBLE SHEETS ALMOST WHOLLY OF PLASTIC, MADE IN IMITATION OF PATENT LEATHER

An importation consisting of a polyurethane skin with a nylon fabric backing was classified as other fabrics of textile materials of man-made fibers, coated or laminated with plastic, under item 355.82, Tariff Schedules of the United States, and was claimed to be classifiable as flexible sheets almost wholly of plastic, made in imitation of patent leather, under TSUS item 771.40.

On the record presented, the court found that since the value of the polyurethane material was in excess of the nylon fabric, the importation was not made of textile materials as the term "of" is defined in general headnote 9(f)(i); that since the importation's essential character was the distinct visual and tactile quality which was imparted to it by the polyurethane material, the importation was "almost wholly of" plastic as that phrase is defined in general headnote 9(f)(iii); and that the nylon backing did not impart the essential character to the article. Accordingly, the claim of the plaintiff was sustained. *Canadian Vinyl Industries, Inc.*, C.D. 4626 ---------- 1

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76-11.

POROSITY Page
SPONGE IRON POWDER (*see* IRON POWDER, C.D. 4635).
PORTABLE ELECTRIC LAMPS
BLINKER LANTERS (*see* LANTERNS, BLINKER, C.D. 4643).
"MORE THAN" (*see* LANTERNS, BLINKER, C.D. 4643).
OTHER; LIGHTS, INSPECTION (*see* INSPECTION LIGHTS, C.D. 4665).
POSTMARK, DATE OF
FILING OF SUMMONS (*see* RULE 3.2(b) OF THE COURT, VALIDITY OF, C.D. 4651).
POWDERS, OTHER (*see* IRON POWDER, C.D. 4635).
PREDOMINANT FEATURE OR FUNCTION
CHIEF VALUE, COMPONENT MATERIAL OF (*see* KITS, ELECTRIC TRAVEL BEAUTY, C.D. 4642).
PREMATURE FILING OF PROTEST
VOID LIQUIDATION (*see* RES JUDICATA, C.D. 4663).
PRESERVATIVE AND PACKING MEDIUM (*see* CHERRIES IN SYRUP, C.D. 4646).)
PRESIDENTIAL PROCLAMATION, PROTEST AGAINST LIQUIDATION BASED UPON A VOID PRESIDENTIAL PROCLAMATION
JURISDICTION (*see* RES JUDICATA, C.D. 4663).
PRESUMPTION OF CORRECTNESS
BURDEN OF PROOF
(*see* FIGURES, PLASTIC HORSE, C.D. 4654).
(*see* GLOVES, MOTOCROSS, C.D. 4641).
(*see* KITS, ELECTRIC TRAVEL BEAUTY, C.D. 4642).
(*see* PEARL BARLEY, C.D. 4631).
(*see* PELLETS, GRAIN SCREENING, C.D. 4649).
(*see* VALETS WITH SEATS AND VALET STANDS, C.D. 46638).
PRINTERS
AND PARTS, INTERNEGATIVE; CAMERAS OTHER THAN FIXED FOCUS (*see* PRINTERS, INTERNEGATIVE, C.D. 4661).
INTERNEGATIVE; EQUIPMENT SPECIALLY DESIGNED FOR PHOTOFINISHING STILL PICTURES

Certain merchandise described as Internegative Printers and various parts was classified as other enlargers and camera-enlargers as to the printers, under item 722.18, Tariff Schedules of the United States, and the various parts as parts of other enlargers and camera-enlargers, under TSUS item 722.34. Plaintiff claimed that the merchandise should be classified as other equipment specially designed for photofinishing (still pictures), not specially provided for, under TSUS item 722.94, or, alternatively, as electrical articles and electrical parts of articles, not specially provided for, under TSUS item 688.40. Defendant claimed that the merchandise should be alternatively classified as other cameras other than fixed focus.

The court held, with respect to the printers, that the evidence established sales to and usage principally by professional photofinishers in the duplication and printing of slides and the making of internegatives from transparencies, that there was no evidence of reference to and usage of the printers as cameras or enlargers, and therefore the printers were properly classifiable as equipment specially designed for photofinishing still pictures; and that the parts were properly classifiable as electrical articles and electrical parts of articles, not specially provided for, there being no dispute between the parties as to the electrical nature of the parts. Accordingly, the claims of the plaintiffs were sustained. *E. Besler & Company, a/c Sickles, Inc., et al.*, C.D. 4661 231

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76–35

PARTS OF INTERNEGATIVE; PARTS OF ENLARGERS AND CAMERA-ENLARGERS, OTHER (*see* PRINTERS, INTERNEGATIVE, C.D. 4661).

PROPER PARTY PLAINTIFF — Page

EVIDENCE INSUFFICIENT (*see* PROPER PARTY PLAINTIFF, C.D. 4658).

LACK OF PROSECUTION, MOTION TO DISMISS FOR

Defendant moved pursuant to rule 4.7(b)(1) and (2) to dismiss a certain action for lack of jurisdiction on the ground that plaintiff was neither an importer, consignee or authorized agent within the meaning of sec. 514, Tariff Act of 1930, as amended (19 U.S.C. sec. 1514), and hence lacked standing to file protests, and upon their denial, to invoke the jurisdiction of the court under 28 U.S.C. sec. 1582, as amended.

Based upon the exhibits, entry papers and accompanying documents, the court found that plaintiff had failed to establish that it had standing under 19 U.S.C. sec. 1514 to file the protests in this action, and, consequently, it had failed to meet the jurisdictional prerequisites of 28 U.S.C. sec. 1582(c)(1). Accordingly, defendant's motion to dismiss was granted and the action was dismissed. *Pasco Terminals, Inc.*, C.D. 4658 ---------- 204

Rehearing applied for

PROSECUTION, MOTION TO DISMISS FOR LACK OF

PLAINTIFF, PROPER PARTY (*see* PROPER PARTY PLAINTIFF, C.D. 4658).

PROTEST

DISMISSED; LACK OF PROSECUTION (*see* RES JUDICATA, C.D. 4663).

INVOLVING ORIGINAL CLASSIFICATION NOT WITHIN SCOPE OF RELIQUIDATION; RELIQUIDATION CONCERNED WITH AD VALOREM RATE (*see* PROTEST UNTIMELY, C.D. 4657).

PREMATURE FILING OF; LIQUIDATION, VOID (*see* RES JUDICATA, C.D. 4663).

TIMELINESS OF; LIQUIDATION BASED UPON A VOID PRESIDENTIAL PROCLAMATION (*see* RES JUDICATA, C.D. 4663).

UNTIMELY; MOTION TO DISMISS FOR LACK OF JURISDICTION

A certain entry was liquidated on November 5, 1971 under item 685.23, Tariff Schedules of the United States and duty was assessed at 11% ad valorem. On February 22, 1972, plaintiff filed a claim for relief pursuant to 19 U.S.C., sec. 1520(c)(1) to correct a clerical error, claiming that the rate of duty for item 685.23 was 10.4%, which claim was granted and the entry reliquidated on March 23, 1972, and excess duties refunded on May 17, 1972. On August 11, 1972, plaintiff filed a protest challenging the original classification of the involved merchandise. Defendant moved the court pursuant to rule 4.7(b)(2) to dismiss the action for lack of jurisdiction, contending that the protest, filed more than 9 months after liquidation of the entry and 141 days after reliquidation of the entry, was untimely by virtue of 19 U.S.C. sec. 1514(b)(2). Plaintiff opposed the motion, asserting that its protest was timely filed in that the entry papers contained a second liquidation stamp of May 17, 1972, which, it claimed, was the date that the reliquidation occurred.

The court held that the actual date of reliquidation, March 23, 1972, was clearly stamped on the consumption entry; that an examination of the entry also made it clear that the customs officer erroneously stamped thereon the date of the refund, May 17, 1972, as the date of the liquidation notwithstanding that that entry already bore the stamp "liquidated Nov. 5, 1971," and that it was apparent from the pencilled "X" running through the stamp stating "liquidated May 17, 1972" that this error was recognized. The court further held that the involved reliquidation concerned only the ad valorem rate to be applied under the liquidated classification, and hence a protest involving the original classification was not within the scope of said reliquidation. Accordingly, defendant's motion to dismiss was granted and the action was dismissed. *Consolidated Sewing Machine Corp. of California*, C.D. 4657 ---------- 202

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RES JUDICATA
FAILURE OF PLAINTIFF TO PRESENT ESSENTIAL FACTS IN PRIOR ACTION (*see* RES JUDICATA, C.D. 4663).
IDENTICAL ISSUE IN PRIOR CASE (*see* RES JUDICATA, C.D. 4663).
JUDGMENT DISMISSING PROTEST FINAL AND CONCLUSIVE

Certain protests were dismissed for lack of prosecution. Plaintiff filed motion for summary judgment claiming that the court lacked jurisdiction over said protests which were filed against liquidations that were void because they were made pursuant to an invalid Presidential proclamation, and that the protests must be dismissed for prematurity inasmuch as the time for filing the protests had not commenced to run. Defendant in its cross-motion contended that the dismissal of the involved protests was a final adjudication and that the doctrine of res judicata was a bar to the action, and further that plaintiff's claim should be barred under the doctrine of laches.

The court held that under the circumstances presented, it was too late to raise the question of juridsiction; that the plaintiff had failed to move for a rehearing or to appeal from the decisions dismissing the involved protests; that the judgments became final and that all questions that were raised or could have been raised for determination, including the jurisdiction of the court, which plaintiff failed to do, were subsumed in the final judgments; that the judgments dismissing the protests were determinative of the issue raised therein by the plaintiff and were res judicata of that same issue raised in the instant action; and that that determination, while open to direct review, could not be attacked collaterally. Accordingly, plaintiff's motion for summary judgment was denied, defendant's motion for summary judgment was granted, and the action was dismissed. *R. W. Smith & Co., Inc.*, C.D. 4663 253

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RUBBER OR PLASTICS, ARTICLES NOT SPECIALLY PROVIDED FOR OF (*see* SUIT AND TRANSPARENT COVERS, C.D. 4645).

RULE 3.2(b) OF THE COURT, VALIDITY OF

Defendant filed a motion to sever and dismiss a portion of a certain action under rule 3.2(b), claiming that the instant summons, which was mailed on the last day allowed for commencement of an action and received by the court on the following day, and challenging the validity of said rule which provides that such a summons shall be deemed filed as of the date of postmark.

The court held that the word "filing" means receipt by the court; that the power given to the court to prescribe the "form, manner, and style" of filing was not so extensive as to allow mailing to be treated as filing nor could the court create an evidentiary presumption of filing under the circumstances involved; that it is the Congress which determines the jurisdiction of the court; and that the power of the court must be exercised within the jurisdictional limits of the statute, and that, therefore, rule 3.2(b) was invalid. Accordingly, the action was dismissed as to the entries involved. *Harold Koren & Co., Inc.*, C.D. 4651 159

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SUIT AND TRANSPARENT COVERS
RUBBER OR PLASTICS, ARTICLES NOT SPECIALLY PROVIDED FOR OF

Certain plastic covers used as protective coverings for clothes were classified as articles not specially provided for, of rubber or plastcs, under item 774.60, Tariff Schedules of the United States, and were claimed to be classifiable as "like furnishings," under TSUS item 772.35. Cross-motions for summary judgment were filed by the parties.

The court held that notwithstanding their ostensible similarity with articles specifically enumerated in item 772.35, the importations did not possess the essential characteristics or purpose common to all the articles enumerated *eo nomine* in said item and, therefore, were not *ejusdem generis* with them; that although used as protective coverings, the plastic covers were designed to be used for clothing and not on articles or furnishings associated with a home or place. Accordingly, plaintiff's motion was denied and defendant's cross-motion was granted.

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Upon reading and filing defendant's motion for summary judgment accompanied by a statement of material facts, plaintiff's response to defendant's motion for summary judgment, plaintiff's statement pursuant to rule 8.2(b) of the court, the record in *The United States v. Yoshida International, Inc.*, 63 CCPA 15, C.A.D. 1160 (1975), incorporated in the motion, and upon all other papers and proceedings in the case, the court, in view of the decision in said *Yoshida International, Inc.*, granted defendant's motion for summary judgment. *Alcan Sales, Div. of Alcan Aluminum Corporation*, C.D. 4633 41
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TENTS, BACKPACKING
SPORT EQUIPMENT
Certain tents were classified as articles of textile materials, under item 389.60, Tariff Schedules of the United States, and were claimed to be classifiable as sport equipment, under TSUS item 735.20.
On the testimony presented, the court held that backpacking, an activity in which persons travel on foot in wild areas and maintain themselves with supplies and equipment carried on their back, was a sport within the meaning of the tariff schedules, and that the imported tents, which were specially designed to be carried and used as shelter in the sport of backpacking, were sport equipment. Accordingly, the claim of the plaintiff was sustained. *The Newman Importing Co., Inc.*, C.D. 4648 143
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FURNISHINGS; UNORNAMENTED COTTON
Bolster cases
Certain merchandise, consisting of velveteen and corduroy covers for articles referred to in the entry papers as "bedrests" and "wedge bolsters," was classified as unornamented cotton furnishings of pile or tufted construction, the velveteen under item 366.60 and the corduroy under item 366.63, Tariff Schedules of the United States. Plaintiff claimed that the merchandise was properly classifiable as unornamented cotton bolster cases, under TSUS item 363.30. The involved merchandise was the same as that the subject of *Brentwood Originals* v. *United States*, 73 Cust. Ct. 185, C.D. 4572 (1974), the record of which was incorporated in the instant case. In cross-motions for summary judgment plaintiff relied on the principle of *stare decisis* while defendant claimed to have clearly and convincingly demonstrated the existence of error in the opinion on which plaintiff relied.
The court held that the instant case was appropriate for the application of the rule of *stare decisis;* that the controlling consideration in the case was that the imported articles, covers for wedge-shaped cushions and pillow-like cushions with short arm extensions, be chiefly used as bed furnishings, which proposition was held to have been proved in the prior case; that defendant's evidence in the present case did not cast doubt on the correctness of that result; and that the term "bolster cases," when read in the light of the comprehensive headnote definition of bedding, was not added to the tariff language for the redundant meaning of one rather obscure variety of pillowcase but to describe the covers of articles chiefly used to support individuals on a bed. Accordingly, plaintiff's motion for summary judgment was granted. *Brentwood Originals*, C.D. 4655 ---------- 195
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VOICE UNITS
Certain articles invoiced as "voice units," which were inserted into dolls and other objects to reproduce prerecorded sentences or sayings, were classified as parts of toys, not specially provided for, under item 737.90, Tariff Schedules of the United States, as modified, and were claimed to be classified as phonographs, under TSUS item 685.32.
The court found that the imported "voice unit" had a permanently affixed interleaved record which did not provide merely an auxiliary or incidental function but was at least of equal importance to the sound reproducing or phonographic portion of the article, and therefore the imported article was not just another version or model of a phonograph but was rather a new and distinct commercial entity containing the elements of both a phonograph and a record. Accordingly, the court held that the new entity was something more than as well as other than the phonographs encompassed by item 685.32 and overruled plaintiff's claim. *Mattel, Inc.*, C.D. 46393 ---------- 84
TRACTORS
FOUR-WHEELED; TRACTORS SUITABLE FOR AGRICULTURAL USE
Certain four-wheeled tractors, models C5D and C6D, denominated "Tree Farmers" by the manufacturer, the primary use of which was for skidding logs, were classified as "other" tractors under item 692.35, Tariff Schedules of the United States, and were claimed to be entitled to entry free of duty under TSUS item 692.30.
On the record presented the court found that the science of silviculture relates to the growing of trees and that it matters not who

TRACTORS—Continued Page
FOUR-WHEELED—Continued
uses the "Tree Farmer," that is, whether the trees are harvested by commercial loggers, farmers, or itinerant laborers, nor does it matter whether the end product is utilized for fuel, fencing, lumber, woodpulp, etc., that the harvesting of a timber crop is an agricultural pursuit. Accordingly, the plaintiff's claim for free entry was sustained. *Norman G. Jensen, Inc.*, C.D. 4634 42
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TREATY, ABROGATION OF
Certain hiking boots purchased by the plaintiff, a United States citizen, an Indian by race and a member of the Penobscot nation, were classified as other footwear, of leather, valued over $2.50 per pair, at 10% ad valorem. Plaintiff paid the duty and protest was formally made in which an exemption from duty was claimed pursuant to article III of the Treaty of Amity, Commerce and Navigation (Jay Treaty). Plaintiff filed a motion for summary judgment under rule 8.2 of the court, and defendant, agreeing that no genuine issue of fact existed, cross-moved for summary judgment, denying the contention of the plaintiff, claiming as its principal defense that article III of the Jay Treaty had been abrogated by the War of 1812.
Based upon a review of the cases involving the effect of war upon a treaty existing between belligerent countries and the pertinent legislative history, the court held that the decisions in *Karnath* v. *United States ex rel. Albro*, 279 U.S. 231 (1929), and *United States* v. *Garrow*, 24 CCPA 410 (1937), *cert. denied*, 302 U.S. 695 (1937), were properly determinative of the facts and issues in the instant case and that the applicable provisions of article III of the Jay Treaty relied on by the plaintiff had been abrogated by the War of 1812 and were no longer in force or effect, nor did they constitute the "supreme law of the land" as they related to the plaintiff and the issues raised by him in his motion for summary judgment. Accordingly, the cross-motion of the defendant for summary judgment was granted and the motion of the plaintiff for summary judgment was denied. *Andrew Akins*, C.D. 4629 15
Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76–12
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CHAIRS (*see* VALETS WITH SEATS AND VALET STANDS, C.D. 4638).

FURNITURE OF WOOD, OTHER THAN CHAIRS

Certain merchandise invoiced as valets with seats and valet stands was classified as chairs under item 727.30, Tariff Schedules of the United States, and was claimed to be classifiable as furniture of wood, other than chairs, under TSUS item 727.35.

The court held that the evidence of record and the applicable law supported the classification of the merchandise as chairs; that the features which distinguished a chair from other seats is that it is for one person, has a back, a seat raised above the ground, and is used for sitting; that the testimony and exhibits in the case established that the importations were designed to support a person in a sitting position and that they were so used; and that the plaintiff had failed to prove that the imported merchandise was "other than chairs." Accordingly, the protests were overruled. *Nevco Furniture Corp.*, C.D. 4638 ---------- 75

VALIDITY OF RULE 3.2(b) OF THE COURT (*see* RULE 3.2(b) OF THE COURT, VALIDITY OF, C.D. 4651).

VESSEL, FOREBODY OF

FLOATING STRUCTURE

The forebody of a French tank vessel which was towed across the Atlantic Ocean from Le Havre, France to Mobile, Alabama, was classified as a floating structure, under item 696.60, Tariff Schedules of the United States. Plaintiff claimed that the forebody was a vessel within the meaning of sec. 401(a), Tariff Act of 1930, as amended (19 U.S.C. 1401(a)), and hence entitled to duty-free entry by virtue of general headnote 5(e) of the tariff schedules.

On the record presented, the court held that the imported forebody which was towed across the Atlantic not as a means of transportation on water, but for the single purpose of being used as the forebody for the jumbolization (i.e. enlargement of the cargo carrying capacity) of an American tanker, was properly classified by Customs as a floating structure and not as a vessel. Accordingly, plaintiff's claim was overruled. *Vancor Steamship Corp.*, C.D. 4627 ---------- 4

Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76–13

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PHONOGRAPHS (*see* TOYS, NOT SPECIALLY PROVIDED FOR, PARTS OF, C.D. 4639).

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ROUND WIRE (*see* WIRE, C.D. 4644).

WIRE RODS

Certain metal products were classified as round wire, under item 609.45, Tariff Schedules of the United States, and were claimed to be classifiable as wire rods, under TSUS item 608.78.

Based upon the record presented and a consideration of the statutory definitions of the terms "wire rod" and "wire," the court held that the imported merchandise was properly classifiable as wire rods as claimed. *The Kanthal Corporation*, C.D. 4644 ---------- 124

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Appealed to U.S. Court of Customs and Patent Appeals, Appeal 76-15

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Sec. 24.5 (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
Sec. 174.13(2) (*see* SUMMONS, MOTIONS TO AMEND, C.R.D. 76–4).
RULES OF THE CUSTOMS COURT
Rule 6.1(c) (*see* MOTION FOR SANCTIONS, C.R.D. 76–3).
Rule 6.3(a) (*see* MOTIONS FOR SANCTIONS, C.R.D. 76–3).
Rule 6.5(b)(2)(ii) (*see* MOTION FOR SANCTIONS, C.R.D. 76–3).
Rule 8.2 (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).
TARIFF ACT OF 1930, SEC. 514 (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
TARIFF SCHEDULES OF THE UNITED STATES
Item 652.98 (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).
Item 657.20 (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).
U.S. CODE
Title 5, sec. 551 et seq. (*see* MOTION TO COMPEL DISCLOSURE, C.R.D. 76–1).
Title 19
Sec. 1514(b)(1) (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
Sec. 1582(a) (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).

DEFINITION
STRUCTURE (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).

DELIVERY PERMIT, IMMEDIATE
IDENTITY OF PARTY MAKING ENTRY AND FILING PROTEST KNOWN TO CUSTOMS OFFICIALS (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).

DISCLOSURE, MOTION TO COMPEL
NAMES AND POSITIONS OF INVOLVED PEOPLE (*see* MOTION TO COMPEL DISCLOSURE, C.R.D. 76–1).

DISCOVERY, ORDER COMPELLING
Failure to comply with order compelling discovery (*see* MOTION FOR SANCTIONS, C.R.D. 76–3).

FAILURE TO COMPLY WITH ORDER COMPELLING DISCOVERY Page
DISCOVERY, ORDER COMPELLING (*see* MOTION FOR SANCTIONS, C.R.D. 76–3).
IDENTITY OF PARTY MAKING ENTRY AND FILING PROTEST KNOWN TO CUSTOMS OFFICIALS
DELIVERY PERMIT, IMMEDIATE (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
IMPORTER
NAME OF; PROTEST, SUMMONS AND COMPLAINT IN DIFFERENT NAMES (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
NUMBER OF PROTESTANT ON PROTESTS, IDENTICAL; PROTEST (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
ISSUE OF FACT, GENUINE
"STRUCTURE" (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).
JURISDICTION OF COURT, LACK OF
SEVER AND DISMISS ENTRIES, CROSS-MOTION TO (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
JURISDICTIONALLY DEFECTIVE, NOT
SUMMONS INCOMPLETE, CAPTION ON (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
MOTION
FOR SANCTIONS
Defendant filed a motion for sanctions pursuant to rule 6.5(b)(2) on the ground that plaintiff had not complied with an order of the court compelling discovery, in that plaintiff had failed to answer certain propounded interrogatories.
On the record presented the court held that under all the facts and circumstances, defendant's motion for sanctions under the rule of the court should be granted unless plaintiff provided the requested information. Accordingly, the court ordered that plaintiff should be precluded from either introducing at the trial of the issues in this action, or presenting in conjunction with a dispositive motion, any evidence concerning the information sought to be elicited by the interrogatories in question unless plaintiff within 60 days of service of the instant opinion and order served the defendant with supplemental answers to said interrogatories fully providing the information requested thereby, and that in the event the order was complied with, plaintiff might move to vacate the sanctions. *Gehrig, Hoban & Co., Inc.*, C.R.D. 76–3.. 277
FOR SUMMARY JUDGMENT
Certain shore frame systems were classified as articles of iron or steel under item 657.20, Tariff Schedules of the United States, and were classified as other structures and parts of structures, under TSUS item 652.98. Plaintiff filed a motion for summary judgment under rule 8.2, which was opposed by defendant on the ground that a material issue of fact existed which required resolution by a trial.
The court held that testimony establishing whether or not at the time of the enactment of the tariff schedules the term "structure" in its commercial sense applied to shore frame systems was clearly germane; that on this point the affidavits of the parties were sharply conflicting, and thus there existed a genuine issue as to a material fact requiring a trial. Accordingly, plaintiff's motion for summary judgment was denied. *S.G.B. Steel Scaffolding and Shoring Co., Inc.*, C.R.D. 76–2.. 274
TO COMPEL DISCLOSURE
Plaintiff moved to compel disclosure of the names and positions of certain people involved in the "formulation" of ORR Ruling 202–71 (which resulted in the disputed classification) and for a statement of their activity in connection with the ruling as well as the identification of written material they consulted, to which motion defendant filed objections.
The court found that defendant's objections were made not so much to the identifying information requested as to the likelihood this would lead to objectionable inquiries into the mental processes, opinions and

MOTION—Continued Page
TO COMPEL DISCLOSURE—Continued
communications of these persons, which problem, the court felt, could be met if and when it arose. The court held that the inquiries appeared reasonably calculated to yield evidence on the nature of ORR Ruling 202–71 and the issue of compliance with the Administrative Procedure Act, 5 USC, sec. 551 et seq. without requiring the disclosure of objectionable material. Accordingly, plaintiff's motion to compel disclosure was granted with respect to interrogatories 1, 2, 3 and 4. *Way Distributors, Inc.*, C.R.D. 76–1 273

NAMES AND POSITIONS OF INVOLVED PEOPLE
DISCLOSURE, MOTION TO COMPEL (*see* MOTION TO COMPEL DISCLOSURE, C.R.D. 76–1).

OTHER STRUCTURES AND PARTS OF STRUCTURES
SHORE FRAME SYSTEMS (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).

PROPER PARTY PLAINTIFF (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).

PROTECTIVE ORDER, TIMELY APPLICATION NOT MADE FOR
SANCTIONS, MOTION FOR (*see* MOTION FOR SANCTIONS, C.R.D. 76–3).

PROTEST
IMPORTER NUMBER OF PROTESTANT ON PROTESTS, IDENTICAL (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
SUMMONS AND COMPLAINT IN DIFFERENT NAMES (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).

SANCTIONS, MOTION FOR
PROTECTIVE ORDER, TIMELY APPLICATION NOT MADE FOR (*see* MOTION FOR SANCTIONS, C.R.D. 76–3).
TIMELY OBJECTIONS NOT FILED (*see* MOTION FOR SANCTIONS, C.R.D. 76–3).

SEVER AND DISMISS ENTRIES, CROSS-MOTION TO
JURISDICTION OF COURT, LACK OF (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).

SHORE FRAME SYSTEMS
ARTICLES OF IRON OR STEEL (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).
OTHER STRUCTURES AND PARTS OF STRUCTURES (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).

"STRUCTURE"
ISSUE OF FACT, GENUINE (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).

SUMMARY JUDGMENT, MOTION FOR (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).

SUMMONS
INCOMPLETE, CAPTION ON; JURISDICTIONALLY DEFECTIVE, NOT (*see* SUMMONS, MOTION TO AMEND, C.R.D. 76–4).
MOTION TO AMEND; PROPER PARTY PLAINTIFF
Plaintiff, alleging that its name was inadvertently abbreviated on the entry documents and that the error was followed on the summons filed in a certain action, moved to amend the summons by changing the plaintiff's name thereon from "Creative Playthings" to "Creative Playthings, Division of CBS, Inc.," asserting that this amendment would not prejudice defendant's rights since Creative Playthings, Division of CBS, Inc. was at all times the actual plaintiff in this action. Defendant opposed the motion and cross-moved to have three entries, which were covered by one of the two protests designated in the summons, severed from the action and dismissed with prejudice as to all claims relating thereto on the grounds that the court lacked judisdiction of the subject matter and plaintiff lacked standing to maintain the action.
On the record presented the court found that the Bureau of Customs was fully cognizant of the identity of the party entering the merchandise and filing the involved protests, or on whose behalf the instant

Summons—Continued Page
Motion To Amend; Proper Party Plaintiff—Continued
actions were undertaken, and held that sec. 514 of the Tariff Act of 1930, as amended, should be liberally construed; that the involved protest comported with the requirements of said sec. 514; and that, although the caption on the summons was incomplete, in view of the known identity of the party named thereon, the summons was not jurisdictionally defective. Accordingly, defendant's motion to dismiss the involved entries was denied. With respect to plaintiff's motion to amend the summons, the court found that "Creative Playthings" was a division of "Columbia Broadcasting System, Inc.," not "CBS, Inc.," that there was no evidence of record to indicate the existence of "CBS, Inc." as a corporate entity or as the importer of record in the action, and denied the motion without prejudice to its renewal upon a proper showing. *Creative Playthings, Division of CBS, Inc.*, C.R.D. 76–4---- 282

TIMELY OBJECTIONS NOT FILED
SANCTIONS, MOTION FOR (*see* MOTION FOR SANCTIONS, C.R.D. 76–3).

WORDS AND PHRASES
STRUCTURE (*see* MOTION FOR SUMMARY JUDGMENT, C.R.D. 76–2).

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